SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 57

W. E. HOWARD, JR., PETITIONER,

vs.

KENNETH T. LYONS AND JOSEPH S. McATEER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 **Appendix to Appellants' Brief**

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the CIVIL ACTION DOCKET, in the cause entitled:

Civil Action No. 56-768-M

KENNETH T. LYONS

and

JOSEPH S. McATEER

v.

W. E. HOWARD, JR.

Docket Entries

1956

Sept.	4	Complaint for Libel, filed. Summons issued.
	10	Marshal's return of sums, with service Sept. 4, 1956, filed. (On USA and of deft. Howard at Navy Yard).
Nov.	2	Defendant's answer filed.

1957

Mar.	13	Appearance of William H. Taylor, Jr. for plffs, filed.
Apr.	2	Motion for summary judgment filed.
	15	McCARTHY, J. After hearing upon motion for summary judgment, motion taken under advisement.
May	8	McCARTHY, J. Memorandum on motion for summary judgment, filed. Motion of the deft, for summary judgment under Rule 56 is granted. Judgment shall enter for the deft. Copies to counsel.
	10	McCARTHY, J. JUDGMENT entered. In accordance with a memorandum of the Court dated May 8, 1957 on deft's motion for summary judgment it is ORDERED motion of the defendant for summary

judgment under Rule 56 allowed. FURTHER ORDERED judgmeent for the defendant, action dismissed. Copies to counsel.

2 1957

10 Bonds on appeal filed by plaintiffs Joseph S. McAteer, et al and Kenneth T. Lyons, et al each for $250.00. Massachusetts Bonding and Insurance Company as surety.

10 Notice of Appeal filed by the Plaintiffs, Kenneth T. Lyons and Joseph S. McAteer, under Rule 73 (B).

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, this 8th day of July 1957.

JOHN A. CANAVAN
Clerk
By: (s) DOROTHY C. CLARK
Deputy Clerk

IN UNITED STATES DISTRICT COURT

Complaint for Libel—Filed September 4, 1956

1. The plaintiff, Kenneth T. Lyons, is a citizen of the Commonwealth of Massachusetts, resides in Watertown in said Commonwealth, and is the National Commander of the Federal Employees Veterans Association, Inc., an existing corporation duly organized under the laws of the State of Delaware. The plaintiff, Joseph S. McAteer, is a citizen of the Commonwealth of Massachusetts, resides in Somerville in said Commonwealth, is an employee of the Boston Naval Shipyard in said Commonwealth and is the Commander of the Boston Naval Shipyard Post No. 1 of the said Federal Employees Veterans Association. The defendant is a citizen of the State of Maryland and is the Commanding Officer of the Boston Naval Shipyard

3 under the jurisdiction of the Secretary of the Navy.

The amount involved in this action, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00) with respect to each plaintiff.

2. The plaintiffs allege that on September 8, 1955, the said defendant, W. E. Howard, Jr., composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed the libel hereinafter set forth, a true copy of which is hereto attached and marked Exhibit "A" and which is incorporated herein as fully as if set forth at length herein.

3. The plaintiffs further allege that while the said memorandum attached hereto as Exhibit "A" purports upon its face to be an official memorandum to be directed to the Chief of the Bureau of Ships, at Washington, D. C. and to the Chief of Industrial Relations, Office of Industrial Relations at Washington, D. C., the said defendant, W. E. Howard, Jr., outside of his official duties, on the date of the said memorandum Exhibit "A", duly released true copies of the said memorandum to the United Press, the Associated Press, the International News Service, all of the daily newspapers in the City of Boston, Massachusetts, and to all of the members of the Congressional Delegation from the State of Massachusetts serving in the Congress of the United States, and in so doing departed from his official duties, and acted solely in a personal capacity, and beyond his official duties.

4. The plaintiffs further allege that the said defendant well knowing the premises, but contriving and intending to injure the plaintiffs and to deprive them of the respect, confidence and esteem of the members of the Federal Employees Veterans Association and of the public, and their fellow employees, and contriving to deprive each of the plaintiffs of his good name and to hold each of the plaintiffs in public scorn and contempt, ridicule and disgrace,
4 did on the 8th day of September, 1955, maliciously, wilfully, wickedly, recklessly and falsely and with malice aforesight charge that the conduct of each of the plaintiffs in protecting the rights of the members of the Federal Employees Veterans Association in governmental employment amounted to overt subversion, meaning and intending to mean that each of the plaintiffs was an enemy of the United States, and in truth and fact charged and meaning to charge that each of the plaintiffs was in effect a traitor to his country, and that the foregoing was accom-

plished by use of the following words obtained in memorandum Exhibit "A".

"They wonder why a management, which must be considered sound since the Navy Department condones its existence, continues to permit a condition which amounts to overt subversion to exist, operate, and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely. Then, again the Federal Employees Veterans Association does not restrict the publicizing of its activities or of its statements, allegations, innuendoes, and indictments to shipyard employees. By design they are placed on city desks of newspapers, are sent to Members of Congress, and released to any source where it might be expected that a spark of interest could be ignited. The end result is that a continuing array of charges, unsubstantiated to be sure, but charges nevertheless, are being distributed within and without the shipyard by a group which enjoys the incongruous privilege of official recognition along with responsible organizations—a recognition accorded by the very target of their vitriolic propaganda."

5 5. The plaintiffs further allege that in the said memorandum Exhibit "A" the said defendant maliciously, wickedly, recklessly, wilfully and falsely made the following statements:

"It is considered that this observation bears out the shipyard's opinion that management is castigated only because it is management—not because of sound, valid and honest exceptions taken as a result of administrative actions. In these releases facts are distorted, if they appear at all, rumors are planted, and general employee unrest is stimulated. Enclosure (9), in particular, resulted in what was essentially a deep-reaching investigation; although it was officially designated an "examination into the facts," directed by the Chief, Bureau of Ships, to allay uncertainty and suspicions imbedded in the minds of the Massachusetts

Congressional Delegation as to the integrity and professional competence of the Commander, Boston Naval Shipyard, and certain members of his staff. The fact that the "examination," a lengthy and expensive procedure, resulted in the concurrence by the Chief, Bureau of Ships, of the report of findings that, "there has been nothing illegal or improper in the administration or actions of the Shipyard Commander" does not discount the fact that the productive loss in the Shipyard during and for sometime after the examination, due to the apprehension such an investigative procedure naturally engenders in each and every employee's mind, although not calculable, was substantial."

"In view of the experience noted by the Shipyard Commander during his relatively short tenure to date at the shipyard, coupled with the record of activity to which the immediate predecessor Shipyard Commander was exposed and likewise involved during his
6 tenure, the shipyard feels that action of an arbitrary nature regarding shipyard relations with the Federal Employees Veterans Association has reached a point of necessity. The shipyard therefore is informing Shipyard Post No. 1, for reasons which will be specified as inimical to the general well being of the shipyard, both employees and management, that on 9 September 1955 recognition of Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard will be withdrawn."

6. The plaintiffs further allege that the said defendant in writing, composing, publishing, and circulating the whole of the said memorandum marked Exhibit "A" meant, and intended to mean and convey to the members of the Federal Employees Veterans Association in the Boston area and throughout the United States and continental possessions of the United States, wherever the said Organization had members, and meant and intended to mean and convey to the public and to the fellow employees of the plaintiffs that the plaintiffs as officers of the said Organization and as individuals were engaged in subversive activi-

ties, contrary to the interests of their government, and that the said memorandum was published and circulated to hurt, injure and prejudice the character and reputation of the said plaintiffs, both as officers of the said Organization and as individuals, and to expose each of them to hatred, contempt and ridicule.

7. The plaintiffs further allege that the entire memorandum, Exhibit "A", as a whole was maliciously, wickedly, recklessly, wilfully and falsely written as a memorandum to the officials to whom it was addressed, but that the prime purpose of the said memorandum was not that it should become a part of the official records of the Navy Department, but that it was written for the sole and
7 exclusive purpose, under color of official duty, for release to the Press of America, and to members of the Congressional Delegation from the Commonwealth of Massachusetts, and to the public generally, as hereinbefore alleged, and that the address of the memorandum to the officials named therein was a pure subterfuge in an endeavor to draw around the defendant the cloak of immunity for the libelous statements contained therein.

8. The plaintiffs further allege that the defendant maliciously, wickedly, recklessly, wilfully and falsely made the following statements in the said Exhibit "A", that the shipyard employees referred to in the said statements are the plaintiffs, Kenneth T. Lyons and Joseph S. McAteer, that in composing, writing, circulating, distributing and causing to be composed, written, published, circulated and distributed the following statements, the said defendant meant and intended to mean that each of the plaintiffs was false to the trust reposed in him as an officer of the said Organization and that each of the plaintiffs was guilty of a breach of duty to the membership of the Organization, and that the defendant, by the said statements, sought to discredit each of the plaintiffs in his attempt to carry out his duties as an officer of the said Organization. That by the following statements, said defendant meant and intended to mean that each of the plaintiffs was obstructing and thwarting, not only the legitimate purposes of the Federal Employees Veterans Association, but was obstructing and thwarting the Boston Naval Shipyard in carrying

out its functions, and since the shipyard is a Naval installation engaged in the production and maintenance of ships vital to the National Defense, such obstruction and thwarting were activities treasonable with respect to the United States, and the defendant charged that the plaintiffs were in effect guilty of treason against the Government of the United States:

8 "An objective, unbiased appraisal of the contents develops the deduction that any purposes served by the publication of such material are inconsistent with the purposes cited in the Association's Constitution and By-Laws as set forth in paragraph 2 above. Such an appraisal likewise reveals that the Federal Employees Veterans Association, Post No. 1, has as a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans Association who, coincidentally, are shipyard employees, and at least one of whom is a supervisor and therefore a member of shipyard management."

9. The plaintiffs further allege that they are honorably discharged veterans of the armed services of the United States, that they are loyal citizens of the United States and that they are not members of any organization or political party whose interests are adverse to the interests of the United States.

10. The plaintiffs further allege that the publication of the libelous statements as contained in Exhibit "A" and heretofore referred to, has injured the reputation of each of the plaintiffs, both individually and as officers of the Federal Employees Veterans Association, that because of the reckless, malicious and wicked manner in which the said libelous statements of the defendant were written, published and circulated, each of the plaintiffs is entitled to have and recover from the defendant compensatory damages.

11. Trial by jury is demanded in this action.

WHEREFORE, each of the plaintiffs prays for judgment against the said defendant in the amount of Five Hundred Thousand Dollars ($500,000.00) as compensatory damages besides the cost of this action.

(s) IRVING KAPLAN
11 Beacon Street
Boston, Massachusetts.
Attorney for the Plaintiffs

Exhibit "A"

BOSTON NAVAL SHIPYARD

8 September 1955

From: Commander, Boston Naval Shipyard
To: Chief, Bureau of Ships
Department of the Navy
Washington 25, D. C.
Chief of Industrial Relations
Office of Industrial Relations
Department of the Navy
Washington 25, D. C.
Subj: Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc.; notification of action withdrawing official shipyard recognition to
Ref: (a) NCPI 60
Encl. (1) COMNAVSHIPYD BSN 1tr (100) P8-1 to BNS Post No. 1, FEVA, Inc., to be released on 9 Sep 1955 (copy)
(2) COMNAVSHIPYD BSN 1tr (100) P8-1 of 8 Sep 1955 to Hon. John W. McCormack, M.C. (copy)
(3) BNS Post No. 1, FEVA, INC. Publication dated Aug 1955 (copy)
(4) BNS Post No. 1, FEVA, INC. Publication dated Jun 1955 (copy)
(5) BNS Post No. 1, FEVA, INC. Publication dated Apr 1955 (copy)
(6) BNS Post No. 1, FEVA, INC. Publication dated Mar 1955 (copy)
(7) BNS Post No. 1, FEVA, INC. Publication dated Feb 1955 (copy)

(8) Bns Post No. 1, Feva, Inc Publication dated Jan 1955 (copy)
(9) Bns Post No. 1, Feva, Inc. Publication released Dec 1954 (copy)

1. The records in this shipyard indicate the Federal Employees Veterans Association was organized in 1946. Although the scope of the organization's activities originally may have been envisioned to include an eventual expansion involving potential membership of federally employed veterans throughout the United States, it appears that the group formed in the Boston Naval Shipyard in 1946 was the parent organization of what is now known as the Federal Employees Veterans Association, Inc.; and that the original Boston Naval Shipyard group later became separately identified as Boston Naval Shipyard Post No. 1. The first record of a meeting of the Federal Employees Veterans Association with the Shipyard Commander appears to be on 6 July 1949. No record is available which reveals a written request for official shipyard recognition; but since Navy Civilian Personnel Instructions permit that such a representation may be made orally, it may reasonably be assumed that such request was made and that approval was granted in a like manner. This conclusion is borne out by (1) the first meeting of record noted above, and (2) by an "Employee Organization Information" form on file dated 19 August 1949 in which certain organizational information was sought from these shipyard organized groups to which official recognition had been accorded. The first roster of officers of the Boston Naval Shipyard group, submitted 16 February 1948, indicates that Mr. Kenneth T. Lyons, Leadingman, Welder, was listed as Adjutant. Subsequently, on 6 July 1949, the Shipyard Commander was informed, at the meeting
11 noted above, that Mr. Lyons had been elected Commander. This information is cited to indicate that Mr. Lyons, a supervisory employee at this shipyard, went on to become the Commander of the national organization of the Federal Employees Veterans Association upon its establishment and, as far as the shipyard's records indicate, has continued in such capacity up to the present time. Although the shipyard is directly concerned only with the

Federal Employees Veterans Association, Boston Naval Shipyard Post No. 1, it is, notwithstanding, significant to note that Mr. Lyons and one other shipyard employee are National Commander and National Adjutant respectively of the national organization, and from a continuing close-hand observation exercise a predominant influence in all the Federal Employees Veterans Association's activities.

2. The "purpose" of the Federal Employees Veterans Association quoted directly from the copy of the Association's "Constitution and By-Laws" on file in the shipyard is as follows:

> "The purpose of this Association shall be to bring together at frequent intervals those ex-servicemen and women who have served on active duty in any branch of the Armed Forces of the United States and have been separated therefrom under honorable conditions and who are now employed by the United States Federal Government directly or indirectly, those who are interested in defending Veteran Preference Rights, in the betterment of general conditions and the welfare and the protection of rights of the veteran for ourselves and posterity, while in the employment of the Federal Government."

3. There is no question that in furtherance of its stated purpose the Federal Employees Veterans Association has been active, alert, and militant in its desire to preserve and acquire rights, benefits, and privileges to veterans
12 employed by the federal government. It is a matter of public record that the Association's activity in this respect ranges from the providing of personal representation at grievance and disciplinary hearings at local levels to sponsorship of civil action in U. S. District Courts and U. S. Courts of Appeal. It is not within the province of the shipyard to evaluate the significance of this latter type of activity since it constitutes, in effect, claims against the United States in which this shipyard as well as other government agencies are, on occasion, involved.

4. Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc., issues to its members on an approximate monthly basis what may be termed a "news-

letter" and which contains information purportedly of interest. The masthead of the publication clearly identifies "Boston Naval Shipyard Post No. 1." Also contained on the masthead is a roster of officers of Post No. 1, all of whom are employees, both supervisory and non-supervisory, of the shipyard. This publication is not submitted for approval for posting on unofficial bulletin boards because the nature of its contents would preclude such approval. However, there is no doubt that the bulletin gets wide circulation within the shipyard and outside as well. The nature of the bulletin content has, for the past two years, become increasingly defamatory of shipyard administration and has revealed a destructively critical attitude toward shipyard, Navy Department, and Department of Defense policy and people. Many of the statements, observations, and opinions contained in the bulletin referring to, or directed at, military personnel border closely upon, if they are not actually, libel. An objective, unbiased appraisal of the contents develops the deduction that any purposes served by the publication of such material are inconsistent with the purposes cited in the Association's Constitution and By-Laws as set forth in paragraph 2 above.

13. Such an appraisal likewise reveals that the Federal Employees Veterans Association, Post No. 1, has as a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans Association who, coincidentally, are shipyard employees, and at least one of whom is a supervisor and therefore a member of shipyard management.

5. The shipyard provides for the Federal Employees Veterans Association, even as it does for any and all other recognized employee groups, readily accessible and well publicized means by which the groups may meet with any level of shipyard management. Many of the groups, including the Federal Employees Veterans Association, avail themselves of this policy. Save for those meetings with the Federal Employees Veterans Association, such meetings, in which viewpoints are exchanged, recommendations considered, and questions involving policy or work situations are discussed, are both constructive and productive. Meet-

ings with the Federal Employees Veterans Association are seldom productive because of the Association's abiding attitude to magnify trivialities and to point a finger of scorn at personalities within and beyond the shipyard so long as they are individuals duly charged with a management responsibility or fulfilling a given mission.

6. The shipyard does not propose to analyze the motives underlying the conditions discussed herein. However, it is felt that the results of such conditions of which the shipyard has factual knowledge should be noted. In the first place, employees as a whole sense a feeling of bewilderment. They wonder why a management, which must be considered sound since the Navy Department condones its existence, continues to permit a condition which amounts to overt subversion to exist, operate, and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely. Then again the Federal Employees Veterans Association does not restrict the publicizing of its activities or of its statements, allegations, innuendoes, and indictments to shipyard employees. By design they are placed on city desks of newspapers, are sent to Members of Congress, and released to any source where it might be expected that a spark of interest could be ignited. The end result is that a continuing array of charges, unsubstantiated to be sure, but charges nevertheless, are being distributed within and without the shipyard by a group which enjoys the incongruous privilege of official recognition along with responsible organizations—a recognition accorded by the very target of their vitriolic propaganda.

7. Reference (a) contains the Navy's policy governing Employee (Group) Relations. The shipyard considers this policy generally sound and that it has been so proven over the years of its existence. Employee groups on the whole have embraced this policy; and by their active, sincere, and constructive efforts within its framework, wholesome relations with the shipyard have developed to the end that operating policies are understood and general employee

morale has been strengthened. However, the shipyard likewise believes that the Navy's Employee (Group) Relations policy, effective as it is in its present form, falls somewhat short of being entirely complete. In recognizing an employee group, the only essential prohibition imposed on the Shipyard Commander is the granting of recognition to an organization associated in any way with any group cited by the Attorney General in his list of subversive organizations. Having determined upon this fact, the Shipyard Commander must, therefore, "recognize" any group desiring to provide employee representation. From this point on reference (a) makes no provision for the cancellation or withdrawal of recognition if, in the opinion of the Shipyard Commander or of higher authority, circumstances have arisen which might warrant such action.

8. The shipyard believes that it has an obligation in pursuance of an equitable Employee (Group) Relations program to accord to those recognized employee groups who demonstrate a sincerity of effort, and who perform an admittedly important function in the contemporary labor-management relations concept, some measure of protection in the public eye and in the employee eye from any group whose methods and whose motives are unethical, uninhibited, and lack the integrity of purpose that could reasonably be expected. Under the present policy outlined in reference (a) it is believed that specified means of discharging such an obligation are lacking.

9. Enclosures (3) through (9) are examples of a trend which the shipyard considers serious and by which the Federal Employees Veterans Association, Post No. 1, emits its editorial expletives directed not only at the shipyard but at Bureau of Ships and Secretarial levels as well as to the President of the United States. It is significant to note, in a review of the enclosures, the consistent pattern of the approach. Although a change of shipyard command occurred during the period covered by the seven publications no perceptible variance of the critical tenor is at all apparent. It is considered that this observation bears out the shipyard's opinion that management is castigated only because it is management—not because of sound, valid, and honest exceptions taken as a result of

administrative actions. In these releases facts are distorted, if they appear at all, rumors are planted, and general employee unrest is stimulated. Enclosure (9), in
16 particular, resulted in what was essentially a deep-reaching investigation, although it was officially designated an "examination into the facts," directed by the Chief, Bureau of Ships, to allay uncertainty and suspicions imbedded in the minds of the Massachusetts Congressional Delegation as to the integrity and professional competence of the Commander, Boston Naval Shipyard, and certain members of his staff. The fact that the "examination," a lengthy and expensive procedure, resulted in the concurrence by the Chief, Bureau of Ships, of the report of findings that, "there has been nothing illegal or improper in the administration or actions of the Shipyard Commander" does not discount the fact that the productive loss in the shipyard during and for sometime after the examination, due to the apprehension such an investigative procedure naturally engenders in each and every employee's mind, although not calculable, was substantial.

10. In view of the experience noted by the Shipyard Commander during his relatively short tenure to date at the shipyard, coupled with the record of activity to which the immediate predecessor Shipyard Commander was exposed and likewise involved during his tenure, the shipyard feels that action of an arbitrary nature regarding shipyard relations with the Federal Employees Veterans Association has reached a point of necessity. The shipyard therefore is informing the Federal Employees Veterans Association, Boston Naval Shipyard Post No. 1, for reasons which will be specified as inimical to the general well being of the shipyard, both employees and management, that on 9 September 1955 recognition of Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard will be withdrawn. In issuing this notice the shipyard does not propose to make provision for "show cause" hearings prior to the action or for any further appeal at the shipyard level.
17 The shipyard considers this latter determination valid and not susceptible to legal redress. Insofar as "recognition" of an employee group in no way appears to be a statutory right, but rather a purely administrative

privilege, it is further considered that the authority for the withdrawal of "recognition" is a logical and necessary corollary to the authority for granting. As both Bureau of Ships and the Office of Industrial Relations are aware, the action proposed above is neither impetuous nor is being taken without full cognizance of the implications. The shipyard, however, is ready to stand firm on the equitableness of its action as being the only alternative available to correct a distressing situation which has already cut deep inroads in the effectiveness of the necessary employee (group) relations.

11. By the foregoing, the Office of Industrial Relations and the Bureau of Ships, are herewith advised of the action cited above. The shipyard recognizes that the action being taken is a local command administrative decision. However, because of the significance of the situation which may well have more than local aspects, the shipyard desires that the addresses be informed of the measure the shipyard is taking to meet a problem which has become increasingly complex over an extended period of time and which, in the shipyard's opinion, must be squarely met by the action outlined.

12. Enclosure (1) is a copy of the letter of notification to the Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc., which will be presented on 9 September 1955, and enclosure (2) is a copy of the letter sent this date to Honorable John W. McCormack, M. C., and is one of similar letters sent to all members of the Massachusetts Congressional Delegation.

W. E. HOWARD, JR.

Copy to:
COMONE w/encls

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18 IN UNITED STATES DISTRICT COURT

Defendant's Answer—Filed November 2, 1956

Now comes Admiral William E. Howard, Jr., acting by his attorney, Anthony Julian, United States Attorney for the District of Massachusetts, and for answer says:

FIRST DEFENSE

1. Defendant is without sufficient information to form a belief as to the truth of the allegation that the plaintiff Kenneth T. Lyons is a citizen of the Commonwealth of Massachusetts, resides in Watertown in said Commonwealth and is the National Commander of the Federal Employees Veterans Association, Inc., an existing corporation duly organized under the laws of the State of Delaware. The defendant is without sufficient information to form a belief as to the truth of the allegation that the plaintiff Joseph S. McAteer is a citizen of the Commonwealth of Massachusetts, resides in Somerville in said Commonwealth, and is the Commander of the Boston Naval Shipyard Post No. 1 of the said Federal Employees Veterans, and the defendant denies that said Joseph S. McAteer is an employee of the Boston Naval Shipyard in said Commonwealth. The defendant admits that he is a citizen of the State of Maryland and is the Commander of the Boston Naval Shipyard under the jurisdiction of the Secretary of the Navy. Defendant denies that the amount involved in this action exceeds the sum of Three Thousand Dollars ($3000.00) with respect to each plaintiff.

2. The defendant denies that on September 8, 1955 he composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed any libel or libelous writing. The defendant denies that he composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed the document marked Exhibit A to plaintiffs' complaint, and defendant denies that
19 the document attached to plaintiffs' complaint and marked Exhibit A is a true copy of the official report of the defendant to his superior officers in the Department of the Navy, which report was made by defendant in the course of his official duties. And further answering, defendant denies that said Exhibit A is a true copy of any document composed, written, or caused to be composed or written by the defendant.

3. Defendant says that his official report which is inaccurately represented by Exhibit A to plaintiffs' complaint was and is in fact an official letter from defendant

to the Chief, Bureau of Ships, Department of Navy, and to the Chief of Industrial Relations, Office of Industrial Relations, Department of Navy, Washington, D. C. Defendant denies that outside of his official duties he duly released two copies of his official letter to the United Press, the Associated Press, the International News Service, and to all the daily newspapers in the City of Boston, Massachusetts. Defendant denies that in any respect he departed from his official duties in reference to sending his official letter to the Chief, Bureau of Ships, and the Chief of Industrial Relations, and denies that he acted solely in a personal capacity beyond his official duties in connection with said official letter, and defendant admits that he caused to be sent to interested members of the Massachusetts Congressional Delegation copies of his official letter to the Chief, Bureau of Ships, and defendant says that in so sending copies to the interested members of the Massachusetts Congressional delegation he was acting within the scope of his official duties and pursuant to the Department of Navy policy. And defendant denies any other factual allegation in the third paragraph of plaintiffs' complaint not otherwise specifically denied.

4. Defendant denies each and every allegation of fact in the fourth paragraph of plaintiffs' complaint.

5. Defendant admits that the language quoted in the fifth paragraph of plaintiffs' complaint is a portion of his official report to the Chief Bureau of Ships, but denies that the quoted language or any other portion of his official report was written maliciously, wickedly, recklessly, wilfully and falsely.

6. Defendant denies each and every allegation of fact in the sixth paragraph of plaintiffs' complaint.

7. Defendant denies each and every allegation of fact in the seventh paragraph of plaintiffs' complaint. And further answering said seventh paragraph, the defendant says that said official letter was an official report written to his superiors by the defendant in the course of his official duties.

8. Defendant admits that the quoted language is a portion of his official report to his superiors in the Bureau

of Ships but defendant denies each and every other allegation of fact contained in the eighth paragraph of plaintiffs' complaint.

9. Defendant is without sufficient information to form a belief as to the truth of the allegation contained in the ninth paragraph of plaintiffs' complaint.

10. The defendant denies that the statements contained in Exhibit A to plaintiffs' complaint were or are libelous statements and defendant denies that said statements were libelous or were written, published and circulated in a reckless, malicious and wicked manner. Defendant denies that each of the plaintiffs is entitled to have and recover compensatory damages, and further answering said tenth paragraph of plaintiffs' complaint the defendant is without sufficient information to form a belief as to the truth of any other allegation of fact contained in said tenth paragraph.

21 SECOND DEFENSE

The defendant denies that the defendant made any publication of the memorandum alleged to be libelous.

THIRD DEFENSE

The defendant says that the official letter alleged to be a libel was an official report made by the defendant in the course of his official duties as Commander of the Boston Naval Shipyard to other public officers, and as such was a privileged communication.

FOURTH DEFENSE

Defendant says that if the defendant wrote or published any or all of the statements alleged in plaintiffs' complaint and said Exhibit A thereto, which defendant denies, then such statements were true in substance and in fact.

FIFTH DEFENSE

Defendant says that the words used in said official letter marked plaintiffs' Exhibit A, were a fair and accurate account of an official report of a matter affecting the public interest and that if it appeared that defendant published

same, which the defendant denies, publication thereof was privileged.

SIXTH DEFENSE

Defendant says that the words contained in his official report which is partly reproduced by plaintiffs' Exhibit A do not constitute a libel when addressed to the plaintiffs.

SEVENTH DEFENSE

Defendant says that if it appears that the defendant wrote and published the official letter marked plaintiffs' Exhibit A, which defendant denies, then the actions of the plaintiffs were such as to create a reasonable belief that the matters charged against the plaintiffs by the de-
22 fendant were true, as appears from the full and complete and true copy of the official letter in question which defendant appends hereto and marks defendant's Exhibit A.

EIGHTH DEFENSE

Defendant says that if it appears that the defendant wrote and published the official report which is partially reproduced by and marked plaintiffs' Exhibit A, which defendant denies, then the defendant was engaged in an executive function in an executive proceeding in the course of his official duties and was absolutely privileged.

By his attorney,

ANTHONY JULIAN
United States Attorney

By: (s) ANDREW A. CAFFREY
Assistant U. S. Attorney

(s) JOHN M. HARRINGTON, JR.
Assistant U. S. Attorney

IN UNITED STATES DISTRICT COURT

Motion for Summary Judgment—Filed April 2, 1957

Now comes the defendant, W. E. Howard, Jr., Rear Admiral, U. S. Navy, and moves the Court to enter summary judgment for the defendant in accordance with Rule 56(b) and (c) of the Federal Rules of Civil Procedure, on the ground that there is in this case no genuine issue of material fact. The pleadings previously filed in this action and Defendant's Affidavits A and B hereto attached show the defendant is entitled to judgment as a matter of law.

By his attorney,
ANTHONY JULIAN
United States Attorney

By: (s) ANDREW A. CAFFREY
Assistant U. S. Attorney

(s) JOHN M. HARRINGTON, JR.
Assistant U. S. Attorney

23 **Defendant's Affidavit A**

Now comes J. A. Snackenberg, Rear Admiral, United States Navy, Commandant, First Naval District, and makes oath as follows:

1. I am the Commandant, First Naval District, United States Navy. My military station is at Headquarters, First Naval District, Navy Building, 495 Summer Street, Boston, Massachusetts.

2. I exercise military command and control over W. E. Howard, Jr., Rear Admiral, United States Navy, who is the Commander, Boston Naval Shipyard. I am Rear Admiral Howard's immediate military superior and his commanding officer.

3. Rear Admiral W. E. Howard, Jr., was on active duty with the United States Navy on September 8, 1955.

4. Included among Rear Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the making of reports to the Bureau

of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard.

5. Included among Read Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard.

6. Included among Rear Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the assuring that information concerning his command be made available to the public, and that said information be released to establish media, through official channels. During my official absence on leave, the then acting Commandant, First Naval District, Cap-
24 tain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District, to the editors of the various newspapers in Boston, Massachusetts, copies of the letter from the Commander, Boston Naval Shipyard, to the Chief, Bureau of Ships, and the Chief of Industrial Relations, Washington, D. C.; copies of the letter to the Honorable John W. McCormack; and copies of the letter to Mr. Joseph McAteer, Post No. 1 Commander, Federal Employees Veterans Association.

(s) J. A. SNACKENBERG
J. A. SNACKENBERG
Rear Admiral, U. S. Navy

Subscribed and sworn to March 28, 1957.
Before me

(s) KATHLEEN G. NEARY
Notary Public

My commission expires
March 13, 1959

Defendant's Affidavit B

Now comes the defendant, W. E. Howard, Jr., Rear Admiral, United States Navy, and makes oath as follows:

1. I am the Commander, Boston Naval Shipyard, Boston, Massachusetts, and I occupied that position in the rank of Captain, United States Navy, on September 8, 1955.

2. In the course of my official duties as Commander, Boston Naval Shipyard, I caused to be written and composed and I signed an official communication addressed jointly to the Chief, Bureau of Ships, Department of the Navy, and to the Chief of Industrial Relations, Department of the Navy, which official communication was dated September 8, 1955, and a portion of which official communication is represented by plaintiff's Exhibit A in this
25 case and the entirety of which official communication is represented by defendant's Exhibit A filed in this case.

3. In the course of my official duties as Commander, Boston Naval Shipyard, I was advised that a list of charges against the Boston Naval Shipyard Management made by the Federal Employees Veterans Association was given to every Massachusetts congressman and senator.

4. In the course of my official duties as Commander, Boston Naval Shipyard, I was advised that a report made by Rear Admiral Cowdrey on this list of charges against the Boston Naval Shipyard management by the Federal Employees Veterans Association was given to interested members of the Massachusetts congressional delegation.

5. In the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, I sent copies of defendant's Exhibit A to the Honorable John W. McCormack and to all other members of the Massachusetts congressional delegation.

6. Pursuant to the provisions of U. S. Navy Public Information Manual NAVEXOS P-1035 I transmitted copies of defendant's Exhibit A to the Commandant, First Naval District.

7. I did not release or cause to be released any document or communication relating to defendant's Exhibit A to any representative of the press.

(s) W. E. HOWARD, JR.
W. E. HOWARD, JR.
Rear Admiral, U. S. Navy

Subscribed and sworn to 31 March, 1957.
Before me

(s) ELLIS C. JEFFREY
Notary Public

My commission expires
5/21/60

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26 IN UNITED STATES DISTRICT COURT

Memorandum on Motion for Summary Judgment—May 8, 1957

McCARTHY, *D. J.*

This case came on to be heard upon the motion by the defendant for summary judgment. The defendant asserts an absolute privilege. The contention of the defendant must be sustained.

The complaint, and the affidavits and documents referred to therein, filed in support of this motion, show conclusively that the statements attributed to the defendant were published by him in the discharge of his official duties and in relation to matters committed to him for determination.

The law is clear on the question and the following quotation from a decision by Judge Day summarizes the present state of the law:

> "It has long been established that the heads of governmental departments are immune from Civil liability for acts done by them in the exercise of their official functions. *Spalding* v. *Vilas*, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780. The reason for this rule is one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained and often to the detriment of

public service.' *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, 178, 5 L.R.A., N.S. 163.

"The growth of our governmental activities has long since prevented the head of a department from performing the many activities and duties within its sphere. Of necessity, there must be delegation of authority. And when the act done by a subordinate official occurs in the course subject to the duty to act, it is the act of the department just as much as though performed by the head of that department. Thus the same reason for immunity from civil liability exists
27 with respect to the acts of a subordinate official done in the exercise of his or her official functions. *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135; 118 A.L.R. 1440; *Gregoire* v. *Biddle*, 2 Cir., 177 F.2d 579, Certiorari denied 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1361; *Love* v. *Snyder*, 6 Cir., 184 F.2d 840; *Taylor* v. *Glotfelty*, 6 Cir., 201 F.2d 51; *DeBusk* v. *Harvin*, 5 Cir., 212 F.2d 143.

"The plaintiff, however, contends that the defendant's acts were motivated by malice, and that the doctrine of immunity does not apply to this action. This contention is without merit. Since the acts of the defendant were done by [him] in the discharge of [his] official duties and in relation to matters committed to [him] for [his] official determination, [his] motives are immaterial. *Spalding* v. *Vilas*, supra; *Cooper* v. *O'Connor*, supra; *Gregoire* v. *Biddle*, supra; *Yaselli* v. *Goff*, 2 Cir., 12 F.2d 396, affirmed 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395. The reason for this rule is well stated in *Gregoire* v. *Biddle*, supra, 177 F.2d at page 581:

"'***Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance be-

tween the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest
28 officers than to subject those who try to do their duty to the constant dred of retaliation.***' "
Carson v. *Behlen*, 136 F. Supp. 222, 224-225.

The case of *Barr* v. *Matteo*, decided by the Court of Appeals for the District of Columbia on May 2, 1957, is distinguishable on its facts.

It is my considered judgment that the complaint and affidavits show that there is no genuine issue as to any material fact in this action, and that the complaint fails to state a claim upon which relief can be granted. Accordingly, the motion of the defendant for summary judgment under Rule 56 is hereby granted. Judgment shall be entered for the defendant.

IN UNITED STATES DISTRICT COURT

Judgment—May 10, 1957

McCarthy, *D. J.*

After hearing upon defendant's Motion for Summary Judgment and in accordance with a memorandum of the Court on defendant's Motion for Summary Judgment dated May 8, 1957, it is hereby

Ordered motion of the defendant for summary judgment under Rule 56 allowed.

Further Ordered judgment for the defendant, action dismissed.

By the Court,
(s) John B. Murray, Jr.
Deputy Clerk

(s) William T. McCarthy,
United States District Judge

29 IN UNITED STATES DISTRICT COURT

Plaintiffs' Notice of Appeal to Court of Appeals Under Rule 73(B)—Filed May 10, 1957

NOTICE IS HEREBY GIVEN that Kenneth T. Lyons and Joseph S. McAteer, plaintiffs above named, hereby appeal to the United States Court of Appeals for the First Circuit from the judgment entered for the defendant and against them on May 8, 1957, pursuant to the granting of defendant's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

KENNETH T. LYONS
JOSEPH S. MCATEER
By (s) WILLIAM H. TAYLOR, JR.
Their attorney

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31 **Appendix to Appellee's Brief**

BOSTON NAVAL SHIPYARD POST 1, FEDERAL EMPLOYEES VETERANS ASSOCIATION, INC.

Officers: Joseph McAteer, Commander; Dan Healy, Jr., Jr. Vice-Cmdr.; Al Haley, Jr. Vice Cmdr; Thomas Dezerine, Treasurer; Bert Sparkes, Adjutant; Mark Joseph, Membership; Kenneth T. Lyons, Chairman; Charles McCarthy, Andy Sullivan, Board of Trustees.

Important Meeting Friday Evening—Aug. 26, Hotel Kenmore, Boston, 8 P. M.

Delegates To Be Nominated

Post Officers for 1956 To Be Nominated and Elected at This Meeting—Be Sure To Attend!

National Convention—Sept. 30, Oct. 1 & 2 in Boston

The F. E. V. A. National Convention Will Be Held in Boston, Massachusetts, on September 30, October 1 and 2nd (Friday, Saturday and Sunday) at the Sheraton Plaza Hotel, Boston

The convention program will include a banquet on Saturday together with the F. E. V. A.'s national convention dance on Saturday evening at the main ballroom of the

Sheraton Plaza. Tickets for the banquet will cost $6.00 each. The dance tickets are now on sale at $1.10 per person. It is expected that all members from our shipyard post will make this a gala affair. You might also like to know that your Congressman and your Senators will
32 be dancing along with you at the big dance. Order your tickets *now* from your shop stewards. Reserve now for the banquet on Saturday evening.

Why the Ropewalk?

The Defense Department again announced the closing of the ropewalk. They also announced the closing of other such activities throughout the country. The so-called closing to take the Government out of competition with private enterprise is just so much hooey.

If President Eisenhower was serious during his last campaign when he stated, "Federal employees have nothing to fear if I am elected", then he had better start looking into the job his subordinates are doing while he is batting the golf ball around.

The truth of the matter is that big business wants everything from rope to guns and they do not care what the overall cost is going to be for Uncle Sam. There is not one single item on the list that the Defense Department is going to close, that can be manufactured by private business at a savings to our Government. Practically every item that will be turned over to private business will and will cost the U. S. one to three times more.

Remember the FEVA Is Your Organization

Is It Flynn? Is It Cullen? Is It Howard?

Vacation in the winter time? It appears as though the confused Pipe Shop will not allow their employees to have any vacation or time off until the first snow starts to fall. Confused Cullen blames it all on the silent man (Captain Flynn) but at any rate some have blamed it on the new Shipyard Commander, Captain Howard.
33 There is one thing we do know and that is we can't blame Admiral Snyder, as he is vacationing in France.

At any rate when the hard working boys at the Pipe Shop put in and had approval for their summer vacations, they then went to the various beach resorts and placed deposits (some as high as $250.00) on cottages, etc. Just as some were to depart and just as some of our gents reached their cottages, confused Cullen had telegrams waiting for them to come back to work and then he cancelled *all* vacations for his shop throughout the summer. When asked about it, he claimed that it was Captain Flynn that ordered the cancellation of all vacations. In any event we would like to point out that our good friend Captain Flynn had his vacation. If he would put a little more time in trying to plan his production work schedule instead of trying to put the peak on everyone in the shipyard, the families of the Pipe Shop employees would not have lost the money they put down on cottages and all of them would have had a little vacation from all of the heat.

The Human Thermometer

T'was the day before Saturday and all through Boston not a creature was stirring except at the Boston Naval Shipyard. The thermometer hit the 100 mark and aboard the ships the thermometer hit a low of 120 degrees. Over at the Navy Building they called it quits at 2 o'clock and all were signed off on weather leave. At the Watertown Arsenal they tossed them out and practically all non-air-conditioned stores in Boston gave up. But not so at the Yard.

Our Commander-in-Chief Captain Howard rose from his desk in his air-conditioned room, called the dispensary and asked how many were prostrated from the heat, and then sat back and said that our champs here at the Shipyard will continue to work until 4:10 or 1610 Navy time. We do not know how many had passed out but we do hope that this is not a new type of a thermometer to use when the tropical heat starts to hit Boston.

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Inside Stuff

If Joe Mahoney goes to Washington on a new job that Admiral Cronin is trying to get for him, a party whose last name begins with M will have the inside track on the

Master Rigger's job. Captain Flynn wants "M" and you all know how that stuff works . . . Admiral Snyder paid for his and his Mrs. dinner that was tossed for them by the Masters . . . Some of the temporary help are being shifted into jobs in various sections of the Shipyard, rather than calling in Career employees from the outside (some are non-vets that do not have any status that are being taken care of) . . . Dan Healy the mystery man of 58 (it's a mystery as to what his duties are, if any) took an examination for a GS-14 in Washington . . . the Assistant Secretary of the Navy was a little bit fearing over a legal decision that was made by Neal Ellis of the Navy's Office of Industrial Relations Office. Said the Assistant Secretary after hearing of Ellis's decision, "Are you sure that he is the legal brain for OIR?" F. E. V. A. answered him and said "He has been for some time and has been giving out with some pips" . . . Potts of Public Works is retiring (Nuff said) . . . in our last issue we told how Captain Flynn's daughter was working over at the Cambridge Air Force Research Center. Well our face is red because she isn't. She is working right here in our own Boston Naval Shipyard. You guess it—she is working in her father's department (Production Department) . . . If the United States Civil Service Commission was on the ball they would start looking over some of these hirings.

100 Veterans Restored at Hingham

Over 100 veteran employees will be restored to their positions at the Hingham Naval Ammunition Depot, it was disclosed today by Kenneth T. Lyons, National Commander of the FEVA, as the result of a decision by the United States Civil Service Commission in Washington, D. C., which held that the retention of female ordnance workers at the Hingham Depot while male ordnance workers were being discharged, is illegal.

The F. E. V. A. brought suit against the Commander of the Hingham Depot during the latter part of June. Judge Bailey Aldrich had set August 16, 1955, as the date for hearing for a permanent injunction in connection with this suit.

No Dismissal Yet

The F. E. V. A. has announced, however, that they will not ask for dismissal of the suit until all of the discharged veterans have been restored to their former positions. They also have demanded that the Navy Department not only restore these veterans to their former positions, but also that they be paid back wages from the time of their illegal separation to the present date, which covers a period of approximately three months and amounts to approximately $90,000.00.

The controversy began early in 1955 when the Navy Department gave permanent status to female ordnance workers disregarding veteran ordnance workers who had been hired at the same time. The Navy Department stated that they could make the female workers permanent because of an old Federal statute. However, the officials of the F. E. V. A. claimed that the veterans should have received permanent status at the same time as the women employees under the provisions of the Veterans Preference Act.

The Commanding Officer of the Hingham Naval Ammunition Depot ordered all supervisors to read the Civil Service Commission's announcement of their decision to all of the employees. The announcement in part reads:

> "The following statement shall be read by every supervisor to his assembled workers on August 11, 1955, without fail.
>
> The U. S. Civil Service Commission which authorized the announcement of an examination for ordnance workers (female) as a result of which career status was conferred on female ordnance workers, has now determined that such authorization was in error and has directed the withdrawal of such status of the female workers. Corrective action will be taken retroactive to May 20, 1955."

Wage Survey

Following the recent announcement that the C. I. O. and Bethlehem Steel had concluded a new wage agreement calling for an increase in wages of 11 to 15 cents an hour for East Coast Shipyard Workers, F. E. V. A. officials

requested the Secretary of the Navy to immediately conduct a new comprehensive wage survey based on this contract as well as the new contracts calling for pay increases in the auto, electrical, and transportation industries. While refusing to make any positive promises—the gist of the remarks in the Secretary's office would indicate that the F. E. V. A. proposal was acceptable and would be acted upon. If however the Navy does not start the wage survey by next month F. E. V. A. has a plan in mind to force the issue, which we shall report to you at that time.

37 Promotional Policy

Last month we reported the disinclination of the Production Officer to promote either one of two Jewish employees who topped an examination. Instead, the third man, with a relatively low mark and qualifications, was promoted. At a third step grievance hearing initiated by the man who led the field, the Production Officer, Captain Flynn, refused to reveal why he would not promote the first man on the list. It is only our opinion but we feel that a forthright answer on the part of Captain Flynn would have done much to dispel the awful suspicions that have arisen as a result of this case. Captain Flynn's refusal to answer the questions put to him reminds us, in many respect of those who have refused to answer questions because of the rights enjoyed under the 5th Amendment to the Constitution. All of us can stand on our rights but an honest question deserves an honest answer.

Our Compassionate M. D.'s

The Shipyard Dispensary in keeping with the vows the good doctors made to Hippocrates, had the following comment to make recently to shipyard employees: 1—to a disabled veteran of WW II who is the victim of a foot fungus better known as "Jungle Rot", and who asked for temporary treatment, "send him back to the jungle"; 2—an apprentice, who evidently has the misfortune of being a veteran of the Korean War, recently turned in to the Shipyard Dispensary with an ailment that was diagnosed as a hernia. Six weeks previous the apprentice was examined by the same doctors, on his original employment,

and found *not* to have a hernia. When the poor apprentice requested hospitalization and compensation for his injury, the Industrial Medical Officer wanted to know "What makes you think we're going to carry the freight?"

Our only comment insofar as the Industrial Medical Officer is concerned is that he missed his calling—he would have made a fortune as a comedian!

A Veterans Organization
Paid
Boston, Mass.
Permit No. 55922

BOSTON NAVAL SHIPYARD POST NO. 1, FEDERAL EMPLOYEES VETERANS ASSOCIATION, CHARLESTOWN, MASSACHUSETTS

Extra Yard FEVA Post 1 Extra

This sheet has been inserted as a last minute "Extra" to inform F. E. V. A. members of the occurrences of August 19, 1955, the day of the great rain.

The regular four page Vet-News had already been printed and was ready for mailing, but we felt that the events of this day were too important to wait for another month to acquaint you of them.

In another story of this issue we told you of the Shipyard Commander's refusal to exercise the authority granted him by Congress to close the shipyard, on a time allowed basis, when the temperature hit 100 degrees, because as Captain Howard explained, the dispensary had no reports of heat prostrations. We wonder how much above 100 degrees the temperature has to go before Captain Howard will close the Yard? In this connection it is interesting to note that as of this writing Governor Herter has dismissed State employees on eight days this summer and we doubt if the hottest office in the State House even approached the temperatures aboard ships constructed of steel and aluminum.

At about 10:45 A. M., Friday, August 19, 1955, the F. E. V. A. officially requested Captain Howard to close the Shipyard because of the unprecedented rainfall, and the practical impossibility of men to work aboard

ships. At approximately 11:15 A. M. the Shipyard Commander replied, through the Industrial Relations Officer, that he would not close operations for the following reasons:

(1) Dismissing shipyard employees would create a transportation problem;
(2) The weather forecast indicated that the rain would stop by noon; and
(3) Employees could go home on an annual leave basis if they chose to.

F. E. V. A. then invested a whopping ten cents in a phone call to Forecast 2424 and found that the official U. S. Weather Bureau forecast at 11 A. M. was for continued heavy rain all afternoon, ending in the early evening.

During the noon hour we learned by radio that Massachusetts was experiencing the heaviest rainfall in history, that practically all roads were inundated at one point or another, and that the Commissioner of Public Safety had requested all citizens to avoid any unnecessary travel and to get off the roads and into their homes, as soon as possible.

At about 2 P. M. (1400 Navy time) the F. E. V. A. made another request to the Shipyard Commander to close Yard, pointing out the conditions and weather reports described above and also that a far more serious transportation problem would arise at 4:10 (1610 Navy time) if the hundreds of cars of shipyard employees were added to the already congested Boston traffic situation.

In the meantime, the Fire Department's electrical system was washed out, the dispensary was flooded and had to be pumped out and all major telephone connections in the shipyard went dead, all of which would have been lovely if a crisis of any sort had developed in the shipyard. For instance, how would we get an ambulance, or a fire engine, to any of the piers with the telephone connections dead?

After three more requests the Shipyard Commander finally relented and at 2:55 P. M. (1455 Navy time) he ordered shop employees dismissed at 3 P. M. (1500 Navy time) and office employees dismissed at 3:15 P. M. (1515 Navy time).

We have gone into these details because we feel you should understand the philosophy the Shipyard Commander uses in determining whether or not "climactic conditions" warrant the closing of the shipyard. We feel also that you should know of the unnecessary danger to which Captain Howard exposed every employee by refusing to close the yard earlier. And especially we are interested in wanting to know the value of legislation passed by Congress if men such as Captain Howard, given the responsibility of carrying out the law, either refuses or are reluctant to exercise their authority until a crisis is reached.

We are bringing the entire matter to the attention of the Secretary of the Navy and the Massachusetts Congressional Delegation, requesting that immediate remedial action be taken so that a similar faux pas will not occur in the future.

What Wrong With the Cafeteria? Part 2

Last month, following the announcement of an increase of 10% in prices at the Cafeteria, we commented extensively and made a few recommendations on the operation of the cafeteria. In the first place we felt that the increases were unwarranted, and, secondly, we suggested that if the Cafeteria had been operating at a loss at the prices charged, then an industrial engineering firm should be employed to survey the entire establishment, mode of operation, method of purchases, and preparation of food.

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Since the last issue of the Vet-News we have discussed the Cafeteria, its menus, and prices with a number of professional industrial caterers. The consensus of opinion was that there was something very wrong if a loss occurred at the prices charged. Let's just take one item, coffee. The cost of coffee in the Shipyard is 10 cents a cup. Our catering friends tell us that a cup of coffee can be broken down as follows: using the best brand of coffee and high butterfat content cream, 1 and ¼ cents for cream and sugar, and 1½ cents for the paper cup, for a total cost of 4 cents. Being generous, we are ready to place the average cost of a cup of coffee 20% higher, or 5 cents per cup to produce . . . this leaves a net profit of 5 cents per cup sold. The Cafeteria is now selling an average of 13,000 cups of coffee

per day, which means an annual profit of $169,000 per year on coffee alone. Not to mention the profits realized on doughnuts, pastries, milk and sundries. As one man suggested, you could almost give the hot meals away and still make money. It is senseless for the Shipyard management to insist on burying its head in the sand and refuse to take cognizance of the fact that there is something radically wrong here. We demand, in fairness to the people who buy 260,000 cups of coffee a year, that an independent industrial engineering firm survey the operation of the Cafeteria, with a report containing findings and recommendations that will be made available to all shipyard employees. If there is any possible logical reason for refusing such a demand, we are sure that all hands would be interested in hearing it.

!... Sign a New Member Into F. E. V. A. This Month ... !

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42 **Minute Entry of Argument—November 5, 1957**

(omitted in printing)

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43 IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5263.

KENNETH T. LYONS ET AL., *Plaintiffs, Appellants,*

v.

W. E. HOWARD, JR., *Defendant, Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alfred Sigel, with whom *Irving Kaplan* was on brief, for appellants.

Paul A. Sweeney, Attorney, Department of Justice, with whom *George Cochran Doub*, Assistant Attorney Gen-

eral, *Bernard Cedarbaum*, Attorney, Department of Justice, *Anthony Julian*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

Opinion of the Court—January 13, 1958

MAGRUDER, *Chief Judge*. We have before us an appeal by two plaintiffs, citizens of Massachusetts, from a summary judgment for defendant, a citizen of Maryland, under a complaint for libel.

The defendant is Rear Admiral W. E. Howard, Jr., Commander of the Boston Naval Shipyard. It appears that defendant, as commander of the shipyard, had become increasingly irritated by the conduct of a labor organization called Boston Naval Shipyard Post No. 1. The parent national organization of this local is the Federal Employees Veterans Association, Inc., of which plaintiff Kenneth T. Lyons, who works at the Boston Shipyard, is National Commander. The other plaintiff, Joseph S. McAteer, also alleged to be an employee of the shipyard, is Commander of Boston Naval Shipyard Post No. 1.

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Plaintiffs charge that they are entitled to recover damages for defamatory matter contained in a letter written by defendant on September 8, 1955, addressed to the Chief of the Bureau of Ships, Department of the Navy, Washington, D.C., and also to the Chief of Industrial Relations, Office of Industrial Relations, Department of the Navy. In this letter defendant undertook to explain to his superiors why he had determined to withdraw recognition, as of September 9, 1955, from "Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard".

This letter alleged that plaintiff Lyons by name, and the other plaintiff by description, "exercise a predominant influence" in the organizational activities; that the organization has been giving wide distribution to a newsletter or bulletin; that this bulletin has become more and more unfairly critical of the shipyard administration, for the purpose of not only thwarting the aims of the shipyard administration in the accomplishment of its mission, but also to further personal aims and self-interests of the individuals

in control of the labor organization; that these "editorial expletives" have adversely affected the general morale of employees of the shipyard, who are entitled to be protected against such "overt subversion" by any labor group "whose methods and whose motives are unethical, uninhibited, and lack the integrity of pupose that could reasonably be expected."

The complaint charges that the intent and meaning of the defendant's foregoing letter was to charge that each of the plaintiffs was false to his trust as an officer of the said organization, in engaging in subversive activities directed to the end of obstructing the legitimate purposes of the labor organization and of the shipyard management; that the statements contained in defendant's letter were as a whole written maliciously, wickedly, recklessly, willfully and falsely.

The summary judgment for defendant was based upon a ruling of law that the undoubtedly defamatory statements attributed to the defendant, as commanding officer of the Boston Naval Shipyard, were published by him in the discharge of his official duties, in relation to matters committed to him for determination; and that in respect thereto the defendant was completely and absolutely immune from civil liability, regardless of motive.

There are three possible publications charged in the complaint: (1) The official letter or memorandum to the defendant's superior officers, notifying them of the action taken by him in withdrawing recognition of the employee group at the Naval Shipyard; (2) the communication by defendant to each member of Congress from Massachusetts of copies of this official memorandum or report; (3) the communication by defendant to the United Press, the Associated Press, the International News Service; and to all of the daily papers in the city of Boston, of copies of the aforesaid official report.

As to publication (1) above, it appears from the uncontradicted affidavit of Rear Admiral Snackenberg, Commandant of the First Naval District, and defendant's immediate military superior, that among Rear Admiral Howard's official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the per-

sonnel, civilian or military, employed or stationed at the Boston Naval Shipyard." In deference to the decided cases, we feel obliged to hold, so far as this official report is concerned, that the defendant is protected by an absolute immunity from civil liability. *United States* v. *Brunswick*, 69 F.2d 383 (C.A.D.C. 1934); *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167 (1904); *Farr* v. *Valentine*, 38 App. D.C. 413 (1912); *Taylor* v. *Glotfelty*, 201 F.2d 51 (C.A. 6th, 1952); *Miles* v. *McGrath*, 4 F. Supp. 603 (D.Md. 1933); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D.Ky. 1938). See also *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950); *Papagianakis* v. *The Samos*, 186 F.2d 257 (C.A. 4th, 1950).

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Of course the policy behind the granting of such absolute immunity is not to protect wicked defendants from the normal civil liabilities for the publication of defamatory statements maliciously and in bad faith. Rather, the policy is to further what is deemed to be the greater public interest of assuring to conscientious public officials complete freedom in the exercise of their duties, without the inhibiting fear of possible lawsuits in which they would have to satisfy a jury of their own good faith.

Whether the courts may perhaps have gone too far down the line in developing this doctrine of absolute immunity may be a fair question; at any rate we shall not be astute to develop further the categories of absolute immunity.

We shall now say a word about publication (3) above set forth, namely, distribution of copies of the official report to various representatives of the press. We understand that counsel for appellants abandoned this point on appeal. The record contains an unchallenged affidavit by the defendant in support of his motion for summary judgment stating that he "did not release or cause to be released any document or communication . . . to any representative of the press." It appears from the affidavit of Admiral Snackenberg that the office of the Commandant of the First Naval District makes it a practice of releasing pertinent information to the press; that during his official absence "the then acting Commandant, First Naval District, Captain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District," to repre-

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sentatives of the press of copies of the official memorandum from the Commander of the Boston Naval Shipyard to the Chief of the Bureau of Ships in Washington, D.C. Thus, when the defendant forwarded through channels his official report, he might well have foreseen that copies of such report would surely be released to the press by higher authority. But if Admiral Howard was protected by an absolute immunity in making such official report, it seems to us obvious that he would not lose that immunity by reason of the fact that a higher authority, over whom he had no control, would undoubtedly release to the press a copy of the official communication.

That leaves for consideration the second publication mentioned above. In this respect the defendant's affidavit conceded that in the course of his official duties "and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest," he sent copies of his official memorandum to each of the members of the Massachusetts congressional delegation. It is true that these members of Congress did have an official interest in being kept advised of important developments in labor relations at the Boston Naval Shipyard. It is therefore understandable and certainly not officious that the Commander of the Boston Naval Shipyard might have conceived it to be a proper exercise of his official functions to see to it that the members of Congress should receive copies of such official report, especially as this report was in a sense an answer to charges of maladministration at the Naval Shipyard contained in the newsletters or bulletins of the Boston Naval Shipyard Post No. 1, which the plaintiffs themselves had taken pains to supply to the members of Congress from time to time. Therefore, in making this communication to the members of Congress in the course of the per-
48 formance of his executive functions, we think that the defendant ought to be protected by a qualified or conditional privilege so far as concerns liability for matters of defamation which may be contained therein. See Am. L. Inst., Restatement of Torts § 599 *et seq.* It would be an unwholesome thing to extend to this situation the protection of an absolute immunity such as has been held to apply to official reports to a superior officer.

The protection of judicial officers from the fear of civil lawsuits has been a matter of special concern to the courts. See *Bradley* v. *Fisher*, 13 Wall. 335 (U.S. 1871). There is no doubt that a judge is absolutely immune from civil liability on account of defamatory matters included by him in a judicial opinion which is officially released. Yet the Court of Appeals of New York, in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257 (1943), held that such absolute immunity did not protect a judge in furnishing a copy of his judicial opinion to the West Publishing Company for publication in a series of unofficial reports. The case illustrates the tendency of the courts narrowly to confine the doctrine of absolute immunity. The position of the Commandant of the First Naval District is certainly no stronger than was that of the judge who was a defendant in *Murray* v. *Brancato*.

We may add that we have some question whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a "federal common law," a body of decisional law developed by the federal courts untrammeled by state court decisions. Cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F.2d 539 (C.A. 1st, 1940). It would be difficult to challenge the constitutionality of an act of Congress prescribing an absolute immunity from civil liability, or a conditional privilege, in the case of official reports made by a naval officer to his
49 superiors. In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say? Cf. *United States* v. *Standard Oil Company of California*, 332 U.S. 301 (1947). We pose this question without undertaking to decide it, for we think it would make no difference in the proper disposition of the present case. The complaint here was founded on diversity of citizenship. However, counsel for the parties seem to have presented the case as one of general common law, not confining themselves to the law of any particular jurisdiction. Even if Massachusetts law is controlling, we have no reason to suppose that it would extend the doctrine of absolute immunity to cover defendant's publica-

tion to the members of the Congress. As recognized by the Supreme Judicial Court in *Howland* v. *Flood*, 160 Mass. 509, 516 (1894): "There are comparatively few cases in which parties are protected absolutely from liability for statements which turn out to be defamatory."

A judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for further proceedings not inconsistent with this opinion. No costs on appeal.

WOODBURY, *Circuit Judge*, (dissenting in part). The question is close and authority bearing directly upon it appears to be lacking, but under the circumstances of this particular case I would equate the defendant's communication to the members of the Massachusetts congressional delegation to his communication to his superior officers. I certainly would not go so far as to say that one in the defendant's position always enjoys an absolute immunity from civil liability for defamatory statements in communications addressed to members of Congress. But I would say that there is absolute immunity when, as here, the communication to members of Congress is not gratuitous or officious but is made in accordance with the established departmental policy and practice of keeping member of Congress informed of matters in which they have an official interest, and certainly they have an official interest in matters affecting labor relations at military installations in their districts.

I do not think it would be unwholesome to extend the protection of an absolute immunity to the situation before us. On the contrary, it seems to me that beneficial results might well be expected from a rule giving absolute protection to military officers not only with respect to their communications to their superiors, but also with respect to copies of those communications sent to members of Congress, when the subject matter thereof is pertinent to their legislative duties and functions.

I would say that Congress can be assured of receiving a free flow of unwatered down information of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing

from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent. I would affirm the District Court.

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51 IN UNITED STATES COURT OF APPEALS

Judgment—January 13, 1958

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day; no costs on appeal.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Thereafter, on January 21, 1958, mandate was stayed until further order of Court.

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52 Clerk's Certificate to foregoing transcript omitted in printing

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53 SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

(Title omitted)

Order Extending Time to File Petition for Writ of Certiorari—April 9, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including April 28, 1958.

Felix Frankfurter

Felix Frankfurter
Associate Justice of the Supreme Court of the United States

Dated this 9th day of April, 1958.

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54 SUPREME COURT OF THE UNITED STATES

No. 956, October Term, 1957

W. E. Howard, Jr., *Petitioner*,

vs.

Kenneth T. Lyons and Joseph S. McAteer

Order Allowing Certiorari—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.
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APR 28 1958
JOHN T. FEY, Clerk

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In the Supreme Court of the United States

October Term, 1957

No. .....

W. E. HOWARD, JR., PETITIONER

v.

KENNETH T. LYONS AND JOSEPH S. MCATEER

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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The Solicitor General, on behalf of Rear Admiral W. E. Howard, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-captioned case on January 13, 1958.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 26-28) is not reported. The opinion of the Court of Appeals (App., *infra*, pp. 16-24) is reported at 250 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1958 (App., *infra*, pp. 24-25). The

time to file a petition for a writ of certiorari was extended to, and including, April 28, 1958, by order of Mr. Justice Frankfurter (App., *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an executive officer below cabinet rank has absolute immunity from liability in defamation with regard to the communication of an official report to members of Congress when such communication is made as part of the officer's duty and relates to matters committed by law to his control and supervision.

STATEMENT

This is a libel suit brought by two civilian employees of the Boston Naval Shipyard against the petitioner, Rear Admiral W. E. Howard, Jr., the commanding officer of the shipyard. The alleged libel was contained in an official report written by Admiral Howard to two of his superior officers, copies of which were sent to the members of the Massachusetts congressional delegation.

The District Court granted petitioner's motion for summary judgment on the ground of absolute privilege, finding that the pleadings and affidavits filed in support of the motion showed "conclusively that the statements attributed to the defendant were published by him in the discharge of his official duties and in relation to matters committed to him for determination" (R. 26). The factual background for this finding may be summarized as follows:

The respondents are civilian employees of the Department of the Navy, employed at the Boston Naval Shipyard, and both are officers of the Federal Employees Veterans Association, Inc., an organization composed of veterans of military service in the employment of the Federal Government (R. 2). The Association was accorded official recognition by the shipyard administration as an employees' representative group in 1949 (R. 10). After a time, the shipyard administration found that the activities of the Association were becoming increasingly disruptive of good industrial relations and were having a detrimental effect on employee morale.

The details of the administration's conclusions were set out in the report which is the subject matter of this litigation (R. 9-17). In the report, addressed to the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, Admiral Howard stated that a newsletter published by the Association had become severely critical of shipyard management and of the Navy and Defense Departments, to the point of being defamatory; that the purpose of the newsletter was to thwart the aims of the administration in the accomplishment of its mission and to further the personal self-interest of the Association's officers; that management meetings with the Federal Employees Veterans Association, in contrast to those with other recognized employee groups, were seldom productive of useful and constructive results primarily because of the Association's insistence on magnifying trivialities and its scornful attitude toward management personnel; that the Association's activi-

ties were subversive of shipyard management; that the situation was aggravated by the fact that the Association gave wide publicity to its charges by placing copies of its newsletters with the local press and with members of the Massachusetts congressional delegation; and that, because of the adverse effect of these activities on efficient shipyard operation, and in an effort to protect responsible employee groups, recognition of the Association would be withdrawn (R. 12-17).

This report, setting forth the basis of his action in withdrawing recognition, was sent by Admiral Howard, as Commander, Boston Naval Shipyard, to the two addressees—the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, both in Washington. Copies of the Association's newsletters were attached as enclosures. A copy of the report was sent by Admiral Howard to each member of the Massachusetts congressional delegation because of their known interest in employee relations at the shipyard, because they were known to have received copies of the Association's newsletters, and because they had received copies of charges made by the Association against the shipyard management and an official Navy report of an investigation of those charges (R. 14, 16, 25).

In accordance with applicable Navy regulations, Admiral Howard transmitted copies of the report to the Commandant, First Naval District, who in turn authorized their routine release through the District's Public Information Officer to the editors of various newspapers in Boston (R. 23-25). Admiral Howard,

the sole defendant in this case, did not release the report to any representative of the press (R. 25).

It was stated in an affidavit by Admiral Howard's immediate commanding officer (R. 23-24) that the preparation of the report and its transmittal to the addressees and to the District Commandant were all included among Admiral Howard's official duties and were done in the course of performing those duties; that also included among his duties was "the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard." In addition, Admiral Howard stated in his own affidavit that he sent copies of the communication to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * * " (R. 25). These affidavits were uncontroverted and, aside from the formal papers, constitute the entire record in the case.

On appeal, the Court of Appeals (Judge Woodbury dissenting) reversed the judgment in favor of petitioner and ordered the case remanded for further proceedings (App., *infra*, pp. 16-25). The court held that petitioner was absolutely privileged with respect to the communication of the report to his superior officers and that this privilege was not affected by his awareness that a higher authority, over whom he had no control, would undoubtedly release a copy of the report to the press. But the court held that, with

respect to the communication of the report to members of Congress, petitioner was entitled only to a qualified privilege, requiring him at a trial to satisfy a jury of his good faith. The requirement would be imposed despite the fact, as the court recognized, that the report related to a matter in which the congressmen had an official interest, the fact that petitioner considered the communication of the report to the congressmen to be a proper exercise of his official duty, and the fact that the communication was made, as the court itself noted, "in the course of the performance of his executive functions * * *". (App., *infra*, p. 21).

The court added that it would reach this result regardless of whether the case was decided under "federal common law" or under the law of Massachusetts, and declined to decide which body of law was applicable. In this connection, however, the court posed the following question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (App., *infra*, p. 22).

In his dissent, Judge Woodbury equated the communication of the report to members of Congress with the communication of the report to petitioner's superior officers, since both were part of petitioner's official duties. In addition, Judge Woodbury stressed the policy of keeping members of Congress informed with respect to matters pertinent to their legislative duties and functions (App., *infra*, pp. 23-24).

REASONS FOR GRANTING THE WRIT

The decision in this case is of fundamental significance in the increasingly important field of the privilege of federal officials from liability in defamation. The precise question it presents is whether absolute immunity extends to communications from executive officers below cabinet rank to members of Congress concerning matters in which the latter have an official interest. However, in holding that such a communication is entitled only to a qualified privilege, the Court of Appeals has departed from the broad underlying premise of every federal decision in this area, *i.e.*, that federal courts, without inquiring into questions of motivation, will not hold government officials personally liable in defamation for acts done in the performance of their duties. *E.g.*, *Spalding* v. *Vilas*, 161 U.S. 483; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643. This proposition was assumed even in the two other federal appellate cases in which government officials have been denied the defense of absolute privilege. *Barr* v. *Matteo*, 244 F. 2d 767 (C.A.D.C.), judgment vacated, 355 U.S. 171; *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.). For the first time, the accepted governmental privilege has been so restricted as to be held inapplicable to communications between government officials, despite the uncontroverted fact that the communication here was part of the petitioner's official duties and related to a matter committed by law to his control and supervision.

The effect of the decision, in our view, will be seriously to encumber the free flow of official information from the executive to the legislative branch of government. In addition, the question of absolute immunity of government officials from personal tort liability has become increasingly important in the past years and has not received the attention of this Court since its decision in *Spalding* v. *Vilas*, *supra*. For these reasons, we believe that the ruling merits review.

1. *The precedents.* In *Spalding* v. *Vilas*, *supra*, this Court held that the head of an executive department was immune from liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U.S. at 498. The immunity was absolute so that, as long as the statement was not unauthorized by law or beyond the scope of official duties, motive was wholly immaterial. And, in order to receive the protection of absolute immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed. 161 U.S. at 498-499.

The principles of that decision were followed by the Court of Appeals for the District of Columbia Circuit with respect to official communications later publicized (*Mellon* v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U.S. 530), and as to press releases issued by department heads (*Glass* v. *Ickes*, 117 F. 2d 273, certiorari denied, 311 U.S. 718). The doctrine was extended by that court and by other courts of appeals

to cases involving government officials below the department head level. *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U.S. 643; *Farr* v. *Valentine*, 38 App. D.C. 413; *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167, appeal dismissed, 199 U.S. 616.[1] The controlling factor in those cases was whether the act complained of was within the scope of the official's authority. And the courts recognized that because it is through these lesser officials, acting under appropriate delegations of authority, that the business of government is carried on, "[i]t is * * * not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." *De Arnaud* v. *Ainsworth*, *supra*, at 181.

Government officials have been denied the defense of absolute privilege in only two federal appellate cases, both decided by the Court of Appeals for the District of Columbia Circuit. *Barr* v. *Matteo*, *supra*; *Colpoys* v. *Gates*, *supra*. Neither of those decisions supports the position of the respondents in this case, since those cases turned on whether or not the official's acts were within his "general line of duty." In the *Colpoys* case, the court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the

[1] See also *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6); *Love* v. *Snyder*, 184 F. 2d 841 (C.A. 6); *United States* v. *Brunswick*, 69 F. 2d 383 (C.A.D.C.); *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.).

press with respect to the discharge of two of his deputies for alleged malfeasance. In the *Barr* case, this rule was extended to include policy-making officers below cabinet or comparable rank; the court there held that the Acting Director of the Office of Rent Stabilization went outside his line of duty in issuing a statement to the press concerning disciplinary action to be taken by him against two of his subordinates. In both cases, the court adhered to the general rule that acts done in the performance of official duties are absolutely privileged, but held that the particular officers involved were not performing such duties when they engaged in a general public discussion of official matters. In the present case, however, uncontroverted affidavits established that in communicating with members of Congress petitioner was acting in the course of his duties, and the Court of Appeals recognized that his communication was made "in the course of the performance of his executive functions * * *," (App., *infra*, p. 21).

2. *The necessity that the immunity be absolute.* The federal decisions have generally recognized that, if the true purpose of the rule of immunity is to be effectuated, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such delicate questions of fact as proper motivation and reasonableness of conduct. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581, (C.A. 2), certiorari denied, 339 U.S. 949; *Cooper* v. *O'Connor*, *supra*, at 140. "* * * [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would

dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, *supra*, at 581. The effectiveness of the immunity is all but destroyed if the official is required to subject himself to a full-scale trial, even though its outcome may be favorable to him. The purpose of the rule of absolute immunity is to end litigation at its inception without the necessity of a jury inquiry into the justification for official action, and the possibility of examination and cross-examination into questions of motivation, malice, and good faith. Vigorous performance of duties untrammeled by the fear of retaliation by burdensome private damage actions, with their grave personal impact on the official, requires the existence of an absolute privilege with respect to acts done in the course of those duties. The ruling of the Court of Appeals subjects the official to just such a burdensome trial in every case.

The Court of Appeals did hold that petitioner's communication of the report to his military superiors was absolutely privileged. But we perceive no sound basis for limiting the rule to such cases and holding it inapplicable to communication of the report to members of Congress. Both communications were equally a part of petitioner's official duty. The latter communication was made by petitioner in accordance with the Navy Department policy that members of Congress be kept informed by commanding officers of matters in which the congressmen have an official interest (R. 25). Certainly, this policy is both authorized and desirable, and uncontroverted affidavits

established that petitioner was doing nothing more in this case than executing that policy (R. 23-25). As noted by Judge Woodbury in his dissent, application of the rule of absolute immunity is necessary to assure that Congress receive a free flow of information needed to exercise its own functions and to free executive officers "from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith" (App., *infra*, p. 24). It is surely not uncommon or undesirable for government agencies to seek to keep Congress informed of current activities within the agency.

3. *This Court's order in the Barr case.* In *Barr* v. *Matteo*, 355 U.S. 171, the Government, on behalf of a former Director of the Office of Rent Stabilization, petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit that a press release issued by an agency head below cabinet rank was not absolutely privileged. This Court granted the petition, vacated the judgment of the Court of Appeals, and remanded the case to that court with directions to pass upon the petitioner's claim of a qualified privilege. This Court held (355 U.S. at 172-173):

> * * * Especially in a case involving on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties, this Court should avoid rendering a decision *beyond the obvious requirements of the record.*

> In the present case a ground far narrower than that on which the Court of Appeals rested its decision, the defense of qualified privilege, was consistently pressed in the District Court and in fact urged in the Court of Appeals itself. In these circumstances we think that the broad requirements of judicial power and its proper exercise should lead to consideration of the defense of qualified privilege. [Emphasis added.]

The record in the instant case, like that in *Barr*, presents an important issue of public law involving the competing considerations of the individual's reputation and the public's interest in free disclosure of official matters. But, unlike the record in *Barr*, the record here does not permit the litigation to be disposed of on a narrower ground. The important difference between this case and *Barr* is that here the defense of absolute privilege was sustained on motion for summary judgment in the District Court, so that there is no record with respect to the issues involved in the defense of qualified privilege. The latter defense was not presented to the District Court or to the Court of Appeals. In *Barr*, on the other hand, the District Court overruled the absolute immunity defense, and since this was not an appealable order, the case was tried before a jury on the other issues. Thus, the Court of Appeals in *Barr* had before it a complete record upon which it could have disposed of the litigation without necessarily having reached the broad question of absolute privilege. Given this fact, the error of the Court of Appeals, this Court ruled, was in holding Barr to his original waiver and not considering, on the record before it, the defense of

qualified privilege. In the instant case, no trial has been conducted, and the decision of the Court of Appeals requires the petitioner to do precisely what we have contended the rule of absolute privilege is designed to avoid, *i.e.*, litigate in a trial before a jury questions of motivation, reasonableness of conduct, and good faith. In the *Barr* case, this Court did not require that a second trial be conducted, but only that the Court of Appeals first consider the narrower question presented by the record, especially since that question "was consistently pressed in the District Court and in fact urged in the Court of Appeals itself" (355 U.S. at 173).[2]

4. *Applicable law.* The court below adverted to the question of "whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a 'federal common law,' a body of decisional law developed by the federal courts untrammeled by state court decisions." (App., *infra*, p. 22). The court found it unnecessary to resolve the question since "it would make no difference in the proper disposition of the present case." But the court posed this question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts

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[2] On remand in *Barr*, the Government has in fact argued in the Court of Appeals that the record, without the necessity of a second trial, establishes Barr's good faith.

might say?" (c ing the decision of this Court in *United States* v. *Standard Oil Co.*, 332 U. S. 301).

We believe that this question must be answered in the affirmative. Indeed, with the exception of this case, all of the federal courts which have dealt with the question of privilege of federal officials have, without even any discussion, treated the issue as one of federal law. In our view, a uniform federal rule is essential so that uniform results will be reached and the availability of the immunity defense will not depend on the peculiarities and variations of local law. Furthermore, since the controlling factor in these cases is generally the scope of the defendant-officer's official duties, the problem becomes one of the relationship of the officer to the federal government he serves, which must of necessity be resolved by the law of that government. Cf. *In re Neagle*, 135 U.S. 1.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
BERNARD CEDARBAUM,
Attorneys.

APRIL 1958.

APPENDIX.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5263.

KENNETH T. LYONS ET AL., PLAINTIFFS, APPELLANTS,

v.

W. E. HOWARD, JR., DEFENDANT, APPELLEE.

Appeal from the United States District Court for the District of Massachusetts.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alfred Sigel, with whom *Irving Kaplan* was on brief, for appellants.

Paul A. Sweeney, Attorney, Department of Justice, with whom *George Cochran Doub*, Assistant Attorney General, *Bernard Cedarbaum*, Attorney, Department of Justice, *Anthony Julian*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

January 13, 1958.

MAGRUDER, *Chief Judge*. We have before us an appeal by two plaintiffs, citizens of Massachusetts, from a summary judgment for defendant, a citizen of Maryland, under a complaint for libel.

The defendant is Rear Admiral W. E. Howard, Jr., Commander of the Boston Naval Shipyard. It appears that defendant, as commander of the

shipyard, had become increasingly irritated by the conduct of a labor organization called Boston Naval Shipyard Post No. 1. The parent national organization of this local is the Federal Employees Veterans Association, Inc., of which plaintiff Kenneth T. Lyons, who works at the Boston Shipyard, is National Commander. The other plaintiff, Joseph S. McAteer, also alleged to be an employee of the shipyard, is Commander of Boston Naval Shipyard Post No. 1.

Plaintiffs charge that they are entitled to recover damages for defamatory matter contained in a letter written by defendant on September 8, 1955, addressed to the Chief of the Bureau of Ships, Department of the Navy, Washington, D. C., and also to the Chief of Industrial Relations, Office of Industrial Relations, Department of the Navy. In this letter defendant undertook to explain to his superiors why he had determined to withdraw recognition, as of September 9, 1955, from "Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard".

This letter alleged that plaintiff Lyons by name, and the other plaintiff by description, "exercise a predominant influence" in the organizational activities; that the organization has been giving wide distribution to a newsletter or bulletin; that this bulletin has become more and more unfairly critical of the shipyard administration, for the purpose of not only thwarting the aims of the shipyard administration in the accomplishment of its mission, but also to further personal aims and self-interests of the individuals in control of the labor organization; that these "editorial expletives" have adversely affected the general morale of employees of the shipyard, who are entitled to be protected against such "overt subversion" by any

labor group "whose methods and whose motives are unethical, uninhibited, and lack the integrity of purpose that could reasonably be expected."

The complaint charges that the intent and meaning of the defendant's foregoing letter was to charge that each of the plaintiffs was false to his trust as an officer of the said organization, in engaging in subversive activities directed to the end of obstructing the legitimate purposes of the labor organization and of the shipyard management; that the statements contained in defendant's letter were as a whole written maliciously, wickedly, recklessly, willfully and falsely.

The summary judgment for defendant was based upon a ruling of law that the undoubtedly defamatory statements attributed to the defendant, as commanding officer of the Boston Naval Shipyard, were published by him in the discharge of his official duties, in relation to matters committed to him for determination; and that in respect thereto the defendant was completely and absolutely immune from civil liability, regardless of motive.

There are three possible publications charged in the complaint: (1) The official letter or memorandum to the defendant's superior officers, notifying them of the action taken by him in withdrawing recognition of the employee group at the Naval Shipyard; (2) the communication by defendant to each member of Congress from Massachusetts of copies of this official memorandum or report; (3) the communication by defendant to the United Press, the Associated Press, the International News Service, and to all of the daily papers in the city of Boston, of copies of the aforesaid official report.

As to publication (1) above, it appears from the uncontradicted affidavit of Rear Admiral Snacken-

berg, Commandant of the First Naval District, and defendant's immediate military superior, that among Rear Admiral Howard's official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard." In deference to the decided cases, we feel obliged to hold, so far as this official report is concerned, that the defendant is protected by an absolute immunity from civil liability. *United States* v. *Brunswick*, 69 F. 2d 383 (C.A.D.C. 1934); *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167 (1904); *Farr* v. *Valentine*, 38 App. D.C. 413 (1912); *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6th, 1952); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md. 1933); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky. 1938). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950); *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4th, 1950).

Of course the policy behind the granting of such absolute immunity is not to protect wicked defendants from the normal civil liabilities for the publication of defamatory statements maliciously and in bad faith. Rather, the policy is to further what is deemed to be the greater public interest of assuring to conscientious public officials complete freedom in the exercise of their duties, without the inhibiting fear of possible lawsuits in which they would have to satisfy a jury of their own good faith.

Whether the courts may perhaps have gone too far down the line in developing this doctrine of absolute immunity may be a fair question; at any rate we shall not be astute to develop further the categories of absolute immunity.

We shall now say a word about publication (3)

above set forth, namely, distribution of copies of the official report to various representatives of the press. We understand that counsel for appellants abandoned this point on appeal. The record contains an unchallenged affidavit by the defendant in support of his motion for summary judgment stating that he "did not release or cause to be released any document or communication . . . to any representative of the press." It appears from the affidavit of Admiral Snackenberg that the office of the Commandant of the First Naval District makes it a practice of releasing pertinent information to the press; that during his official absence "the then acting Commandant, First Naval District, Captain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District," to representatives of the press of copies of the official memorandum from the Commander of the Boston Naval Shipyard to the Chief of the Bureau of Ships in Washington, D. C. Thus, when the defendant forwarded through channels his official report, he might well have foreseen that copies of such report would surely be released to the press by higher authority. But if Admiral Howard was protected by an absolute immunity in making such official report, it seems to us obvious that he would not lose that immunity by reason of the fact that a higher authority, over whom he had no control, would undoubtedly release to the press a copy of the official communication.

That leaves for consideration the second publication mentioned above. In this respect the defendant's affidavit conceded that in the course of his official duties "and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest," he sent copies

of his official memorandum to each of the members of the Massachusetts congressional delegation. It is true that these members of Congress did have an official interest in being kept advised of important developments in labor relations at the Boston Naval Shipyard. It is therefore understandable and certainly not officious that the Commander of the Boston Naval Shipyard might have conceived it to be a proper exercise of his official functions to see to it that the members of Congress should receive copies of such official report, especially as this report was in a sense an answer to charges of maladministration at the Naval Shipyard contained in the newsletters or bulletins of the Boston Naval Shipyard Post No. 1, which the plaintiffs themselves had taken pains to supply to the members of Congress from time to time. Therefore, in making this communication to the members of Congress in the course of the performance of his executive functions, we think that the defendant ought to be protected by a qualified or conditional privilege so far as concerns liability for matters of defamation which may be contained therein. See Am. L. Inst., Restatement of Torts § 599 *et seq.* It would be an unwholesome thing to extend to this situation the protection of an absolute immunity such as has been held to apply to official reports to a superior officer.

The protection of judicial officers from the fear of civil lawsuits has been a matter of special concern to the courts. See *Bradley* v. *Fisher*, 13 Wall. 335 (U.S. 1871). There is no doubt that a judge is absolutely immune from civil liability on account of defamatory matters included by him in a judicial opinion which is officially released. Yet the Court of Appeals of New York, in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257 (1943), held that such absolute immunity

did not protect a judge in furnishing a copy of his judicial opinion to the West Publishing Company for publication in a series of unoffiical reports. The case illustrates the tendency of the courts narrowly to confine the doctrine of absolute immunity. The position of the Commandant of the First Naval District is certainly no stronger than was that of the judge who was a defendant in *Murray* v. *Brancato*.

We may add that we have some question whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a "federal common law," a body of decisional law developed by the federal courts untrammeled by state court decisions. Cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539 (C.A. 1st, 1940). It would be difficult to challenge the constitutionality of an act of Congress prescribing an absolute immunity from civil liability, or a conditional privilege, in the case of official reports made by a naval officer to his superiors. In the abence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say? Cf. *United States* v. *Standard Oil Company of California*, 332 U.S. 301 (1947). We pose this question without undertaking to decide it, for we think it would make no difference in the proper disposition of the present case. The complaint here was founded on diversity of citizenship. However, counsel for the parties seem to have presented the case as one of general common law not confining themselves to the law of any particular jurisdiction. Even if Massachusetts law is controlling, we have no reason to suppose that it would extend the doctrine of absolute

immunity to cover defendant's publication to the members of the Congress. As recognized by the Supreme Judicial Court in *Howland* v. *Flood*, 160 Mass. 509, 516 (1894): "There are comparatively few cases in which parties are protected absolutely from liability for statements which turn out to be defamatory."

A judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for further proceedings not inconsistent with this opinion, no costs on appeal.

WOODBURY, *Circuit Judge*, (dissenting in part). The question is close and authority bearing directly upon it appears to be lacking, but under the circumstances of this particular case I would equate the defendant's communication to the members of the Massachusetts congressional delegation to his communication to his superior officers. I certainly would not go so far as to say that one in the defendant's position always enjoys an absolute immunity from civil liability for defamatory statements in communications addressed to members of Congress. But I would say that there is absolute immunity when, as here, the communication to members of Congress is not gratuitous or officious but is made in accordance with the established departmental policy and practice of keeping members of Congress informed of matters in which they have an official interest, and certainly they have an official interest in matters affecting labor relations at military installations in their districts.

I do not think it would be unwholesome to extend the protection of an absolute immunity to the situation before us. On the contrary, it seems to me that beneficial results might well be expected from a rule giving absolute protection to military officers not only with respect to their communications to their supe-

riors, but also with respect to copies of those communications sent to members of Congress, when the subject matter thereof is pertinent to their legislative duties and functions.

I would say that Congress can be assured of receiving a free flow of unwatered down information of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent. I would affirm the District Court.

[Caption omitted]

JUDGMENT

January 13, 1958.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent

with the opinion passed down this day; no costs on appeal.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

SUPREME COURT OF THE UNITED STATES
October Term, 1957

No. ———

W. E. HOWARD, JR., PETITIONER,

vs.

KENNETH T. LYONS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 28, 1958.

/s/ FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States.

Dated this 9th
day of April, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 57

W. E. HOWARD, JR., PETITIONER

v.

KENNETH T. LYONS AND JOSEPH S. McATEER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 23–25) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 35–42) is reported at 250 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1958 (R. 42). By order of Mr. Justice Frankfurter, dated April 9, 1958, the time for filing a petition for a writ of certiorari was extended to, and including, April 28, 1958 (R. 43). The petition was filed on April 28, 1958, and was granted on June 9, 1958 (*ibid.*). 357 U. S. 903. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a federal executive officer below cabinet rank has absolute immunity from defamation liability with regard to the communication of an official report to members of Congress when such communication is made as part of the officer's duty and relates to matters committed by law to his control and supervision.

STATEMENT

This is a libel suit brought by two civilian employees of the Boston Naval Shipyard against the petitioner, Rear Admiral W. E. Howard, Jr., the commanding officer of the shipyard. The alleged libel was contained in an official report written by Admiral Howard to two of his superior officers, copies of which were sent to the members of the Massachusetts congressional delegation. The District Court, on May 8, 1957, granted petitioner's motion for summary judgment on the ground of absolute privilege. On appeal, the Court of Appeals (Judge Woodbury dissenting) reversed the judgment in favor of petitioner and ordered the case remanded for further proceedings (R. 35–42).

1. The District Court found that the pleadings and affidavits filed in support of the motion showed "conclusively that the statements attributed to [petitioner] were published by him in the discharge of his official duties and in relation to matters committed to him for determination" (R. 23). The factual background for this finding may be summarized as follows:

The respondents are civilian employees of the Department of the Navy, employed at the Boston Naval

Shipyard. Both are officers of the Federal Employees Veterans Association, Inc., an organization composed of veterans of military service in the employment of the Federal Government (R. 2). Respondent Lyons is National Commander of the Association and respondent McAteer is Commander of its Post No. 1 at the Boston Shipyard. The purpose of the organization, as stated in its "Constitution and By-Laws," is the protection of the rights of veterans with respect to the terms and conditions of their federal employment (R. 10).

The Association was accorded official recognition by the shipyard administration as an employees' representative group in 1949 (R. 9). Its officers regularly met with representatives of the shipyard management in regard to employment problems and policies, and it provided personal representation for members at grievance and disciplinary hearings. The Boston Naval Shipyard Post issued to its members, on an approximately monthly basis, a type of "newsletter" containing information purportedly of interest to them.[1] In addition, the organization has sponsored civil litigation on behalf of its members in the federal courts.[2]

After a time, the shipyard administration found that the activities of the Association were becoming

[1] A typical issue of this publication—that of August 1955—is reprinted at R. 26–35. Several issues were attached as enclosures to Admiral Howard's official report which constitutes the alleged libel. They were also attached as an exhibit to the answer.

[2] One such action is discussed in the sample newsletter (R. 29).

increasingly disruptive of good industrial relations and were having a detrimental effect on employee morale. The details of the administration's conclusions were set out in the report which is the subject matter of this litigation (R. 8–15).

In the report, addressed to the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, Admiral Howard stated that the newsletters published by the Association had become severely critical of shipyard management and of the Navy and Defense Departments, to the point of being defamatory; that the purpose of the newsletter was to thwart the aims of the administration in the accomplishment of its mission and to further the personal self-interest of the Association's officers; that management meetings with the Federal Employees Veterans Association, in contrast to those with other recognized employee groups, were seldom productive of useful and constructive results primarily because of the Association's insistence on magnifying trivialities and its scornful attitude toward management personnel; that the Association's activities were subversive of shipyard management; that the situation was aggravated by the fact that the Association gave wide publicity to its charges by placing copies of its newsletters with the local press and with members of the Massachusetts congressional delegation; and that, because of the adverse effect of these activities on efficient shipyard operation, and in an effort to protect responsible employee groups, recognition of the Association would be withdrawn.

This report, setting forth the basis of his action in withdrawing recognition, was sent by Admiral Howard, as Commander, Boston Naval Shipyard, to the two addressees—the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, both in Washington. Copies of the Association's newsletters were attached as enclosures. A copy of the report was sent by Admiral Howard to each member of the Massachusetts congressional delegation because of their known interest in employee relations at the shipyard, because they were known to have received copies of the Association's newsletters, and because they had received copies of charges made by the Association against the shipyard management and an official Navy report of an investigation of those charges (R. 12, 14, 22). In addition, Admiral Howard officially notified the Association by letter that recognition was being withdrawn (R. 15).

In accordance with applicable Navy regulations, Admiral Howard transmitted copies of the report to the Commandant, First Naval District, who in turn authorized their routine release through the District's Public Information Officer to the editors of various newspapers in Boston (R. 21). Admiral Howard, the sole defendant in this case, did not release the report to any representative of the press (R. 23).

It was stated in an affidavit by Admiral Howard's immediate commanding officer (R. 20–21) that the preparation of the report and its transmittal to the addressees and to the District Commandant were all included among Admiral Howard's official duties and

were done in the course of performing those duties; that also included among his duties was "the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard." In addition, Admiral Howard stated in his own affidavit that he sent copies of the communication to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * *" (R. 22). These affidavits were uncontroverted and, aside from the formal papers, constitute the entire record in the case.

2. In reversing the District Court's judgment, the Court of Appeals (Judge Woodbury dissenting) recognized that petitioner was absolutely privileged with respect to the communication of the report to his superior officers and that this privilege was not affected by his awareness that a higher authority, over whom he had no control, would undoubtedly release a copy of the report to the press. But the court held that, with respect to the communication of the report to members of Congress, petitioner was entitled only to a qualified privilege, requiring him at a trial to satisfy a jury of his good faith. This requirement was imposed despite the fact, as the court acknowledged, that the report related to a matter in which the Congressmen had an official interest, the fact that petitioner considered the communication of the report to the Congressmen to be a proper exercise of his official

duty, and the fact that the communication was made, as the court itself noted, "in the course of the performance of his executive functions * * *" (R. 39).

The court added that it would reach this result regardless of whether it applied "federal common law" or the law of Massachusetts, and declined to decide which body of law was applicable. In this connection, however, the court posed the following question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (R. 40).

In his dissent, Judge Woodbury equated the communication of the report to members of Congress with the communication of the report to petitioner's superior officers, since both were part of petitioner's official duties. In addition, Judge Woodbury stressed the policy of keeping members of Congress informed with respect to matters pertinent to their legislative duties and functions (R. 41–42).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals presents one basic question for this Court's determination: whether a federal executive officer is absolutely privileged in sending to interested Congressmen, pursuant to the officer's duty, copies of an official report addresssed to his superior officers.

In resolving this issue, the Court is not restricted by the law of the state in which the communication is published but is free to apply its own rule which will

be generally applicable to official communications of officers of the Federal Government regardless of where the communications are made. The problem is one which is national in scope, involving, as it does, the nature of the authority of federal officials and the extent to which a federal interest requires that they be protected from civil and criminal liability for acts done in the performance of their duties. This reasoning led the Court long ago to hold that federal law, formulated by the federal courts, must control the question of whether officers of the Government could be subjected to criminal prosecution for official acts. *Tennessee* v. *Davis*, 100 U. S. 257; cf. *In re Neagle*, 135 U. S. 1. Precisely the same reasoning requires that federal law be applied in cases of civil liability as well. The policies under consideration are, in both cases, dominated by the federal interests involved, and, in both cases, the central legal relations have their source in federal law. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301.

A

In this case, uncontroverted affidavits established that, in transmitting to members of the Massachusetts congressional delegation copies of his official report to his superior officers, petitioner was performing an official duty as commanding officer of the Boston Naval Shipyard. His action constituted nothing more than compliance with a departmental policy that members of Congress be kept informed by commanding officers of matters in which the Congressmen are known to have an official interest. Under the well-

established federal rule, stemming from this Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, this conduct is wholly immune from liability in defamation. The clear meaning of this rule of immunity is that an officer of the Government will not be subjected to such liability for statements made within the scope of the authority of his office; and this result will be reached without the necessity of a jury inquiry into questions of motivation and reasonableness of conduct.

The court below held that the applicable precedents required the conclusion that petitioner be accorded an absolute privilege with respect to the transmittal of the report to his superior officers. However, the court departed from the underlying premise of the rule in refusing to accord such a privilege to the communication of copies of the report to interested Congressmen, although it recognized that this was equally a part of petitioner's duties. Cf. *Barr* v. *Matteo*, 244 F. 2d 767 (C. A. D. C.), judgment vacated, 335 U. S. 171. We do not perceive any sound basis, and none was suggested by the Court of Appeals, for distinguishing between the two.

B

The courts have recognized, in both defamation and non-defamation cases, that adequate protection of the interests which give rise to the immunity requires that the immunity be absolute, without a jury determination of the propriety of the action taken by the officer in the course of performing his official duties. *E. g.*,

Spalding v. *Vilas, supra; Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949. In defamation cases, the risks of a trial on questions of motivation, of the necessity for the particular means of publication chosen, and of the justification for the language used, are so substantial that the requirement of a trial will itself deter proper performance of duties. Action taken for improper reasons, or to accomplish improper results, can be dealt with by appropriate disciplinary measures, but that is quite another matter from subjecting the innocent official, as well as the guilty, to the burden of a trial as well as to the substantial risk of personal liability.

C V

The fact that petitioner is not of cabinet rank did not justify the departure by the court below from the principles of *Spalding* v. *Vilas, supra.* It is not a particular class of officials that the immunity rule is designed to protect but rather the important public functions which must be performed by officers at various levels. Given the present complexity of governmental operations, it is obvious that much of the business of government must be carried on by subordinates and that these officials perform policy-making functions which involve judgment and discretion. When public statements are made in the course of performing those duties, the policy underlying the absolute privilege fully applies.

ARGUMENT

INTRODUCTION: THE GOVERNING LAW

Prior to the decision of the Court of Appeals in the present case, all of the lower federal courts which have dealt with the question of immunity of federal officers from comparable tort liability have assumed that the issue was governed by federal law and not controlled by the law of the state in which the federal court was sitting. The court below raised this question but found it unnecessary to resolve it, since, in the court's view, the same result would be reached regardless of whether it applied federal law or the law of Massachusetts (R. 40–41). A view favorable to the choice of federal law, however, is suggested by the court's formulation of the question: "In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say?" (R. 40).[2]

We believe that this question must be answered in the affirmative. The issue was long ago settled

[2] Since there is complete diversity of citizenship of the parties (R. 2), no problem of original federal question jurisdiction is involved. See *Johnston* v. *Earle*, 245 F. 2d 793 (C. A. 9); *Viles* v. *Symes*, 129 F. 2d 828 (C. A. 10), certiorari denied, 317 U. S. 633. Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667; *Gully* v. *First National Bank in Meridian*, 299 U. S. 109; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149.

by this Court in *Tennessee* v. *Davis*, 100 U. S. 257. There, the Court sustained the constitutionality of Section 643 of the Revised Statutes (now contained in 28 U. S. C. 1442), which provided for removal to the federal courts of any state civil or criminal action against a federal revenue officer "on account of any act done under color of his office." The Court held that such a suit, at least for the purpose of removal jurisdiction, was a case "arising under" the laws of the United States. Cf. *Johnson* v. *Maryland*, 254 U. S. 51; *In re Neagle*, 135 U. S. 1. This was so even though the cause of action or criminal prosecution was based on state law and the only federal question was the defense that the officer committed the act complained of while in the performance of his official duties. It necessarily follows that the questions of whether a federal officer is acting within the scope of the authority of his office, and whether this constitutes a defense to a state civil or criminal charge, are federal questions governed by federal law alone. "The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them." 100 U. S. at 266. The Court noted that the source of this federal law, formulated by the federal courts, is found in the statutes which create the office and the duties incident thereto and

which by implication afford a substantive defense to the officers executing them.[4]

A uniform federal rule governing the immunity of federal officers is surely just as essential in defamation suits as in state criminal prosecutions. The desirability of uniform results, not varying with the peculiarities of local law, is present with equal force.[5] In both cases, since the controlling factor is generally the scope of the defendant-officer's official duties, the problem becomes one of the relationship of the officer to the Federal Government he serves, which must of necessity be determined by the law of that government. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301.

Especially is this so in view of the nature of the issue. In no area of law is it more clear that a deci-

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[4] Quoting from Chief Justice Marshall in *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 865, the Court declared (100 U. S. at 265):

"The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

[5] For similar reasons, the Court of Appeals for the First Circuit has held, in an analogous case, that federal law controls the liability of a common carrier transmitting an interstate message containing defamatory matter. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539.

sion depends upon a delicate balancing of two competing considerations. As stated by this Court in *Barr* v. *Matteo*, 355 U. S. 171, 172, the question of immunity involves "on the one hand protection of the reputation of individuals, and on the other the interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties * * *."[6] The worth of the federal official's conduct, its lawfulness and justification, do not vary with the locality where the conduct takes place. These are matters of national interest, and, accordingly, the policy determinations should be made by those courts whose reach transcends state boundaries and which are subject to this Court's ultimate supervision.[7]

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[6] See Holmes, *Privilege, Malice, and Intent*, 8 Harvard L. Rev. 1, 3: "[W]hether, and how far, a privilege shall be allowed is a question of policy. * * * [T]he worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts."

[7] No different conclusion is required by the fact that the plaintiff's cause of action in a defamation suit is based on a state-created right and that jurisdiction is accordingly based on diversity of citizenship. It is quite clear that, even in diversity cases, some of the issues may be governed by federal law. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 175–177. As to such issues, the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, has no applicability. Cf. *United States* v. *Standard Oil Co., supra; Clearfield Trust Co.* v. *United States*, 318 U. S. 363. It should also be noted that the legal proceeding involved in *Tennessee* v. *Davis*, *supra*, similarly arose out of state law.

A FEDERAL EXECUTIVE OFFICER IS NOT SUBJECT TO DEFAMATION LIABILITY FOR SENDING TO INTERESTED CONGRESSMEN, PURSUANT TO THE OFFICER'S DUTY, COPIES OF AN OFFICIAL REPORT ADDRESSED TO HIS SUPERIOR OFFICERS

A. *Under established principles, acts of executive officers within the scope of their official duties are absolutely privileged*

Petitioner's motion for summary judgment on the ground of absolute privilege was supported by affidavits of petitioner and his commanding officer. These affidavits established that the preparation of the report, its transmittal to the addressees, and the sending of copies to the Congressmen, were all done by petitioner in the performance of his official duties, and that the report itself was concerned solely with matters committed by law to petitioner's control and supervision as commanding officer of the Boston Naval Shipyard (R. 20–23). Respondents did not attempt to controvert these statements by counter-affidavits or other documents. Accordingly, although the District Court and Court of Appeals arrived at different conclusions, both of them premised their decisions on this basic fact (R. 23, 39).

Admiral J. A. Snackenberg, as Commandant of the First Naval District, was petitioner's immediate commanding officer and thus the most relevant source of information regarding the scope of petitioner's authority and the nature and extent of his official duties.

Admiral Snackenberg stated that petitioner, at the time the alleged libel was written and published, was on active duty with the Navy as Commander of the Boston Naval Shipyard and that included among his official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard" (R. 20–21). Certainly, the withdrawal of official recognition of an employees' representative group constituted significant personnel action, so that petitioner had not only the legal authority but the positive duty to make the report explaining his action, upon which respondents seek to base liability.

Admiral Snackenberg stated further that the furnishing of copies of this report of personnel action to members of the Massachusetts congressional delegation was included within petitioner's official duties (R. 21). In addition, petitioner stated in his own affidavit that he sent copies of the report to the Congressmen "[i]n the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, * * *" (R. 22). This communication was necessitated by the fact that petitioner, as commanding officer of the shipyard, was aware of the Congressmen's knowledge of, and interest in, personnel conditions within his command and by his obligation to keep them abreast of current de-

velopments, especially since the matter was one which had been brought to their attention initially by the Federal Employees Veterans Association itself.

In these circumstances, the consistent pattern of decisions of the lower federal courts, which has developed over a long period of time on the basis of this Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, establishes that petitioner's acts were absolutely privileged. This rule, stated simply, is that an officer of the Federal Government will not be subjected to liability in defamation for statements made within the scope of the authority of his office, and that this result will be reached without the necessity of a jury inquiry into questions of motivation and reasonableness of conduct.

In *Spalding* v. *Vilas, supra,* this Court held that the Postmaster General was immune from liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498. The immunity was absolute so that, as long as making the statements was "not unauthorized by law" (161 U. S. at 493) or beyond the scope of official duties, the existence of malice was immaterial. The immunity would not be lost "by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct." And in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient

that general legal authority for the act existed. The Court declared (161 U. S. 498–499):

> * * * In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premisis that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. * * *

In a case involving similar circumstances, the Court of Appeals for the District of Columbia Circuit held that the Secretary of Treasury was immune from liability with respect to an official letter written to the President and released to newspapers for general publication. *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U. S. 530. The Secretary's motive in submitting the letter was immaterial since it was an official report to a superior and hence absolutely

privileged. And it was immaterial that the President had not requested the report for "it certainly was not beyond the scope of the Secretary's duty and authority to submit one." 18 F. 2d at 171. And in *Glass* v. *Ickes*, 117 F. 2d 273, certiorari denied, 311 U. S. 718, the same court held that the head of an executive department was absolutely privileged to issue a libelous press release which related to official matters, and that, at least in the case of department heads, communications to the general public were within the scope of the official's authority and, therefore, entitled to immunity under the general rule.

In regard to official communications, the doctrine of *Spalding* v. *Vilas* has not been limited to heads of executive departments but has been applied to government officials below this level (see *infra*, pp. 31–33). Thus, in *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616, the Court of Appeals for the District of Columbia Circuit held that the making of an official report by an officer in the War Department to the Secretary of War was absolutely privileged. This result was necessary in order to avoid a serious restraint on "the perfect freedom which ought to exist in discharge of public duty * * *." 24 App. D. C. at 178. And the court followed this decision in *Farr* v. *Valentine*, 38 App. D. C. 413, holding that a communication to the Secretary of the Interior by the Commissioner of Indian Affairs charging the plaintiff with professional incompetency was absolutely privileged. Numerous other decisions

of various federal courts have reached the same result.[8]

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[8] *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.), was a case very similar to the present one. The court ruled that a libel action could not be maintained against a Navy officer for alleged defamatory statements contained in a written communication to one of his superior officers. The communication was held to be absolutely privileged regardless of the motive in making it, as long as it was authorized by law, was made in the course of official duty, and the statements contained in it were germane to an official subject matter.

In *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6), the report of a psychiatrist in the federal service made in the discharge of official duty was held absolutely privileged even though it was assumed that the statements contained in the report were false and actuated by malice And in *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.), the court held that a disciplinary report by a supervisor in the Veterans Administration concerning an employee under her charge was absolutely privileged. Since the defendant had the duty of initiating and recommending action against the employee for unsatisfactory work, her motive in making such a report was held to be immaterial.

This same rule of immunity has been applied to a report of an investigation concerning an appeal proceeding before the Civil Service Commission (*Love* v. *Snyder*, 184 F. 2d 840 C.A. 6)), to defamatory statements by a member of the Tariff Commission to a former employee seeking reinstatement (*Smith* v. *O'Brien*, 88 F. 2d 769 (C.A. D.C.)), to publication of an announcement by the Collector of Internal Revenue that the plaintiff had been disbarred from practicing before the Treasury Department (*Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.)), to statements of an American consul to the Secretary of State concerning the plaintiff's poor business reputation (*United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.)), to statements by an Internal Revenue agent to his superior in the course of official duties (*Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.)), and to a letter written by an executive officer in response to a request for information from the chairman of a congressional committee (*Pearson* v. *Wright*, 156 F. Supp. 136 (D. D.C.)).

Nor has the doctrine of absolute immunity been limited to defamation suits. In *Yaselli* v. *Goff*, 275 U. S. 503, this Court, in a memorandum opinion, affirmed a decision of the Court of Appeals for the Second Circuit (12 F. 2d 396) holding that a Special Assistant to the Attorney General "in the performance of the duties imposed upon him by law, is [absolutely] immune from a civil action for malicious prosecutions * * *" (12 F. 2d at 406). The Court of Appeals ruled (*ibid.*) that "The public interest requires that persons occupying such important positions and so closely identified with judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." This Court affirmed the judgment on the authority of *Bradley* v. *Fisher*, 13 Wall. 335, and *Alzua* v. *Johnson*, 231 U. S. 106, which dealt with the doctrine of absolute privilege in judicial proceedings. *Yaselli* v. *Goff* was thus a clear extension of the judicial immunity to executive officers whose functions demanded vigorous action and the exercise of judgment free from the danger of personal liability.

This case was followed by the Second Circuit in *Gregoire* v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U. S. 949, in a celebrated opinion by Judge Learned Hand. The court ruled that officers of the Department of Justice, irrespective of motives, could not be held personally liable for the wrongful internment of the plaintiff under the Alien Enemy Act of 1798. Judge Hand expressed the policy underlying the prin-

ciple of absolute immunity in these terms (177 F. 2d at 581):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.

In the similar case of *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643, the Court of Appeals for the District of Colum Circuit held officials of the Treasury and Justice Departments absolutely immune from liability for malicious prosecution. And in order to be within the scope of official duties, it was not necessary, the court ruled, that the acts be prescribed by statute or that they specifically be directed or requested by a superior officer. Further case authority in areas outside of defamation, is considerable and uniform in support of the principle of absolute privilege.[9]

[9] Officials of the Securities and Exchange Commission were held privileged as to acts done with respect to a securities registration statement in a suit involving a variety of tort claims. *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A. D.C.), certiorari denied, 314 U. S. 665. In actions for malicious prosecution, the defense of absolute immunity was available to officers of the Home Owners' Loan Corporation (*Adams* v. *HOLC*, 107 F. 2d 139 (C.A. 8)), to Commissioners of the District of Columbia (*Brown* v. *Rudolph*, 25 F. 2d 540 (C.A. D.C.), certiorari denied, 277 U. S. 605), to federal police officers (*Laughlin* v. *Garnett*, 138 F. 2d 931 (C.A. D.C.), certiorari denied, 322 U. S. 738), and to a state deputy fire marshal (*Phelps* v. *Dawson*, 97 F. 2d 339 (C.A. 8)). False imprisonment actions have been successfully defended on the ground of absolute privilege by military officers (*Keppleman* v. *Upston*, 84 F. Supp. 478 (N.D. Calif.)), by members of the U. S. Parole Board (*Lang* v. *Wood*, 92 F. 2d 211 (C.A. D.C.), certiorari denied, 302 U. S. 686), and by immigration officials (*Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U. S. 921). The Collector of Internal Revenue was held absolutely privileged in a suit for conversion of property which was seized in the collection of federal taxes (*Powell* v. *Rothensies*, 86 F. Supp. 201 (M.D. Pa.), affirmed on other grounds, 183 F. 2d 774 (C.A. 3)); and a supervisor in the Veterans Administration was held privileged in a damage suit based on the improperly motivated discharge of a government employee (*De Busk* v. *Harvin*, 212 F. 2d 143 (C.A. 5)).

In the present case, the court below recognized that this unbroken line of authorities in the federal courts required it to hold that petitioner was protected by an absolute immunity insofar as the report to his superior officers was concerned (R. 38). But the court refused to grant to petitioner more than a qualified privilege with respect to his sending copies of the report to interested members of Congress. In our view, there is no sound basis for so limiting the rule of absolute immunity. Both communications were equally a part of petitioner's official duty (R. 23, 39). Nor did the Court of Appeals suggest a rational distinction between them but merely remarked that to extend the protection of absolute immunity to the congressional report would be "an unwholesome thing" (R. 39).

As already noted (*supra*, pp. 15–17), copies of the report were transmitted to the Massachusetts congressional delegation in accordance with the Navy Department policy that members of Congress be kept informed by commanding officers of matters occurring within their commands in which the Congressmen have an official interest. Certainly, this policy is not only authorized but desirable, and uncontroverted affidavits established that petitioner was doing nothing more in this case than executing that policy (R. 20–23). The justification for it is apparent; its fruit is the free flow of information *within* the Government—from the executive branch to the legislative branch. Judge Woodbury expressed the idea in these terms (R. 41–42):

> I would say that Congress can be assured of receiving a free flow of unwatered down infor-

> mation of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. * * *

See also *United States* v. *Harriss*, 347 U. S. 612, 625.

In refusing to accord petitioner an absolute immunity, the Court of Appeals departed from the broad underlying premise of every federal decision in this area, *i. e.*, that federal courts, without inquiring into questions of motivation, will not hold government officials personally liable in defamation for acts done in the performance of their duties.[10] For the Court of Appeals recognized that the copies were sent to Congress by petitioner "in the course of the

[10] Even the New York case relied on by the Court of Appeals did not depart from this principle (*Murray* v. *Brancato*, 290 N. Y. 52, 48 N. E. 2d 257). In holding that a state judge did not have an absolute privilege to publish a judicial opinion containing defamatory matters in an unofficial reporter, the New York court declared (290 N. Y. at 57, 48 N. E. 2d at 259):

"The plaintiff here seeks to hold the defendant for the publication of an opinion in *unofficial* reports and concededly the law placed upon the defendant no duty in connection with such publication.

"* * * a judge has no official duty in connection with any publication of opinions except in the official reports."

performance of his executive functions * * *." (R. 39). Even the two other federal appellate cases in which government officials have been denied the defense of absolute privilege (*Barr* v. *Mattec*, 244 F. 2d 767 (C. A. D. C.), judgment vacated, 355 U. S. 171; *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.)) did not depart from this recognized principle. In the *Colpoys* case, the court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the press with respect to the discharge of two of his deputies for alleged malfeasance. In the court's view, since the marshal was not a policy-making official, no public interest required that his public discussion of the matter be protected in this way. In the *Barr* case, this rule was extended by the District of Columbia Circuit to include policy-making officers below cabinet or comparable rank, and the court held that the Acting Director of the Office of Rent Stabilization went outside his line of duty in issuing a statement to the press concerning disciplinary action to be taken by him against two of his subordinates. In both cases, the court adhered to the general rule that acts done in the performance of official duties are absolutely privileged but held that the officers involved were not performing such duties when they engaged in a general public discussion of official matters.[11]

[11] In the *Barr* case, we have taken the position that the District of Columbia Circuit's concept of "general line of duty" does not conform to the test laid down by this Court in *Spalding* v. *Vilas*, *supra*, so that the effect of the decision is the same as that of the court below in the present case. A second petition for certiorari in *Barr* is being filed by the Government this month.

It may be argued that "scope of authority" cannot encompass an act motivated by malice, since no public official is authorized to perform his duty in that manner nor is there any social interest to be gained from such conduct. See *Gibson* v. *Reynolds*, 172 F. 2d 95, 98-99 (C. A. 8), certiorari denied, 337 U. S. 925. But such reasoning would entirely defeat the doctrine of absolute immunity which is designed to avoid the burden of an inquiry into these very matters. As stated by Judge Hand (*Gregoire* v. *Biddle*, *supra*, at 581), "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." The policy underlying the immunity rule is that the importance of protecting the performance of public duties is not lessened by the presence of a questionable motivation. The performance of the duty is still a part of an official function even though the officer involved does not lament the fact that his action may result in harm to certain individuals.

Thus, in the present case, petitioner found it necessary to withdraw recognition of the Federal Employees Veterans Association as a representative group at the Boston Naval Shipyard and to explain his action to his superior officers and interested members of Congress. These acts were done by petitioner in order to carry out the functions of his position as commanding officer of the shipyard. Even if he were indifferent to the incidental effects which his action would have on the respondents, it would not detract from the im-

portance of protecting that action to insure proper shipyard administration. It is this latter factor which is the dominating consideration.

B. *Adequate protection of the interests which give rise to the privilege requires that the privilege be absolute*

In our view, if the purpose of the rule of immunity is to be effectuated, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such difficult questions of fact as proper motivation and reasonableness of conduct. As the court below noted (R. 38), the policy underlying the rule is not that a federal officer by virtue of his position should have a privilege to defame or to act maliciously, but that a greater public interest requires that the officer, in the discharge of his duties, be uninhibited by the fear of an onerous lawsuit or of substantial personal liability growing out of a jury opinion as to the reasonableness or wisdom of his conduct.

The qualified privilege is forfeited by the use of "excessive" language, by an "excessive" publication, by an "improper" motive, or by the absence of a reasonable belief in the truth of the statements made. See Prosser, *Torts*, § 95, p. 629 (2d ed. 1955). These are matters for a jury determination and obviously cannot be measured easily. The purpose of the rule of absolute immunity is to end litigation at its inception without the necessity for an inquiry into these matters. The decision of the Court of Appeals subjects the official to just such a burdensome trial in every case. Officials, aware of this risk, will act with

greater caution than a proper performance of their duties warrants.[12] They will choose to remain silent in situations in which the public interest requires that they speak out fully and frankly.

The limitations of the protection afforded by the defense of qualified privilege render it inadequate for the important public interests which are almost always involved in cases of government officials. However the rule of qualified privilege may be stated, ultimately the defendant-officer will be faced with the burden of having to provide a justification for his official action. See Prosser, *Torts*, § 95, p. 629 (2d ed. 1955). While such a burden on a defendant may be appropriate when the privilege is accorded for the protection of legitimate private interests, it should not be placed upon officials charged with the responsibility for the conduct of public affairs. These are matters committed to the judgment of the officers and their superiors and which should not be reviewed after the event,[13] to the officers' personal detriment, by court or jury.

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[12] As expressed by Judge Hand (*Gregoire* v. *Biddle*, *supra*, at 581):

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. * * *"

[13] What has been said in support of an absolute privilege in judicial proceedings is equally applicable to executive officers: "What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the

To free the executive officer from the fear of personal liability in damages does not mean that his action will go entirely unchecked. Especially in the case of lesser officials, the elements of supervision and discipline are ever present. As stated by Judge Woodbury with respect to this case (R. 42), "As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent."

Nor is the threat of personal liability the only excessive deterrent on the official's conduct as the result of according him only a qualified privilege. Since questions of fact must be litigated, the time, effort, and expense involved in the litigation combine to deter freedom of action, even though there would be a substantial chance of a favorable decision if the officer were to take the action and run the risk of litigation. And from the public's point of view, the drain on the official's time and energies, which must be devoted to a defense of his conduct, is readily apparent.

For these reasons, we believe that adequate protection of the public interest in vigorous performance of duties by executive officers requires that acts done in the course of performing those duties be absolutely privileged, without need for justification before a jury, and without the threat of personal liability for failure to make such a justification.

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administration of justice commented upon to a jury, and the propriety of it determined by them?" *Scott* v. *Stansfield*, [1868] L. R. 3 Ex. 220, 224. See note 9, *supra*.

C. *The nature of the duty being performed, and not the level of the officer's position, should determine the extent of the privilege*

This Court's decision in *Spalding* v. *Vilas*, 161 U. S. 483, firmly established the principle that heads of executive departments are wholly immune from liability in defamation with respect to official communications. As we have pointed out (*supra*, pp. 19–21), many federal decisions have applied this rule to officials below the department-head level provided that the statement in question was made within the scope of the officer's authority. Given the present complexity of governmental operation, such an application is necessary and inevitable. The head of an executive department cannot personally perform all of the functions of the department but must act through subordinates. Obviously, many of these subordinate officials are performing policy-making functions which involve judgment and discretion. In exercising that judgment, it is often required that statements be made to other officers in the department, to executive officials outside of the department, to members of other branches of government, and, on occasion, to the general public. The policy underlying the rule of absolute immunity is that these duties should be performed freely and vigorously; the rule's entire rationale is the public interest in the function being performed, and not a need that special privileges be attached to high-ranking offices.

The record in the present case establishes that, when he wrote the statements complained of, peti-

tioner was carrying out, as part of his official duties, an authorized departmental policy. As commander of the Boston Naval Shipyard, it was petitioner's obligation to keep interested members of Congress informed of important matters occurring within his command (R. 21, 22). Therefore, his particular position in the administrative hierarchy has no bearing; it is his function of supplying information to the legislative branch of government which requires protection.

In *De Arnaud* v. *Ainsworth,* 24 App. D. C, 167, appeal dismissed, 199 U. S. 616, the Court of Appeals for the District of Columbia Circuit rejected the contention that a subordinate official in the War Department was not entitled to the same immunity as the head of the department when he included defamatory material in an official report. The court ruled:—"It is * * * not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." 24 App. D. C. at 181; see also *Farr* v. *Valentine,* 38 App. D. C. 413.

The District of Columbia court followed this reasoning in *Cooper* v. *O'Connor,* 99 F. 2d 135, 142, certiorari denied, 305 U. S. 643, holding officials of

the Treasury and Justice Departments absolutely immune from liability for malicious prosecution:—"When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself."[14]

Dean Prosser has summarized the cases by stating that "The whole tendency has been away from any * * * distinction on the basis of rank, and the later decisions look rather to the duties which the officer is expected to perform." Prosser, *Torts*, § 95, pp. 612–613 (2d ed. 1955). This Court, in accordance with that development, should hold that petitioner is wholly immune from liability with respect to an official communication which he was required to make in the proper performance of his executive duties.

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[14] Similarly, in *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R. I.), the court declared (136 F. Supp. at 224):

"The growth of our governmental activities has long since prevented the head of a department from performing the many activities and duties within its sphere. Of necessity, there must be delegation of authority. And when the act done by a subordinate official occurs in the course of the official duty of a person clothed with authority and subject to the duty to act, it is the act of the department just as much as though performed by the head of that department. Thus the same reason for immunity from civil liability exists with respect to the acts of a subordinate official done in the exercise of his or her official functions."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and that of the District Court reinstated.

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No. 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

W. E. HOWARD, JR.,
Petitioner,

v.

KENNETH T. LYONS and JOSEPH S. McATEER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

This Court on June 9, 1958 (357 U.S. 903) granted the petition for a writ of certiorari in the above entitled cause. Respondents admit that this Court has jurisdiction in this case.

QUESTION PRESENTED

Whether the petitioner, a Rear Admiral, holding a rank far below that of a Cabinet Officer, who makes a report to his superiors in Washington, D. C., has an absolute immunity in releasing at the same time a copy of the report to members of Congress from Massachusetts, and to the

editors of the newspapers in the Boston, Massachusetts area, and which said report was a defamatory and malicious communication and libelous per se, and which said release was not any part of the official duties of the petitioner.

STATEMENT OF THE CASE

At the time this action arose, the petitioner was a Rear Admiral assigned to the Boston Naval Shipyard. The Federal Employees Veterans Association is an organization whose members are honorably discharged soldiers, sailors and marines who are employed in the Boston Naval Shipyard. The Respondent, Kenneth T. Lyons, is the National Commander of the organization, and the Respondent, Joseph McAteer, at the time in question was the Commander of the Boston Naval Shipyard Post of the organization. In their official capacity they represented the members of their organization in labor relations in the Boston Naval Shipyard. Since the year 1946, when the Federal Employees Veterans Association was first organized, the officials of that organization had represented their members in labor relations matters, and over a period of some nine years there had been more or less a friendly relationship between the employees and management. There were times when disagreements arose, but all of them were settled satisfactorily. There is no question about the loyalty of the Respondents to the government of the United States, or the loyalty of any of the members of the Federal Employees Veterans Association to the government of the United States.

On September 8, 1955, and shortly after his arrival to take charge of the Boston Naval Shipyard, the said petitioner deliberately, maliciously, recklessly, wickedly, and falsely issued a communication marked Exhibit "A" (Tr. R.15) to the Chief of Industrial Relations, Department of

the Navy in Washington, D. C. At the same time, he released a complete and true copy of the text to the members of Congress from the State of Massachusetts, and forwarded through channels a true copy of the text to J.A. Snackenberg, Rear Admiral Commandant First Naval District, who by affidavit stated (Tr. R.21) that through authorized routine it was released to the editors of various newspapers in Boston, Massachusetts. The petitioner knew that the usual routine that would be followed by the release of the communication to Admiral Snackenberg would be that it would be released to the press.

The question therefore involved in this case is whether the petitioner has an absolute immunity from releasing a libelous communication to members of Congress from Massachusetts, and to the editors of the various newspapers in the city of Boston, Massachusetts.

The communication by the petitioner to the members of Congress was not made in any response to any congressional inquiry, investigation, or legislative function of any of the members from Massachusetts. It was purely a gratuitous act on the part of the petitioner.

The statement on page 5 of the petitioner's brief is misleading as to the reason for the release of the communication to members of Congress that charges were made against the shipyard management. No charges were then pending against the shipyard management, and had not been for a period of time more than two years prior to the release of the libelous statement.

The District Court dismissed the action. Upon appeal, the Court of Appeals for the First Circuit reversed the judgment of the District Court holding that the petitioner in releasing the communication did not have an absolute immunity. Circuit Judge Woodbury dissented stating that the question was a close one.

SUMMARY OF ARGUMENT

The Respondents will argue that the petitioner, in releasing the communication which was addressed to the Chief of the Bureau of Ships, Chief of Industrial Relations (R. 8-15), acted beyond his official duties in releasing a copy of the said communication to the Members of Congress from Massachusetts, and to the editors of the newspapers in the Boston area. The Respondents will further argue that the communication in question contains language which is libelous per se and that malice is presumed. The Respondents will further argue, that in any event the immunity which the petitioner had in releasing the libelous communication was only qualifiedly privileged, and since the use of language in said communication which was libelous per se, malice is presumed, and that the majority opinion of the Court of Appeals for the First Circuit was proper and just in holding that the petitioner was responsible for his libelous communication.

ARGUMENT

The Respondents admit that certain decisions of the Courts clothe high officials of the United States government with a cloak of immunity in releasing libelous statements. This cloak of immunity protects officials of Cabinet rank and members of the judiciary. This absolute immunity against suit for libel and slander protects officials of the government establishing policies, and members of the judiciary so that they may fearlessly administer the functions of the offices which they occupy.

The rule of absolute immunity is not to be broadly applied, and while it applies to heads of Executive Departments of the government, it is not to be extended to public officers generally.

Iverson v Frandsen, 237 F.2d 898 10th CCA

The rule of absolute immunity was established by this Court in the case of *Kendall* v *Stockes*, 44 U.S. (3 How) 87, 98, and later in the case of *Spalding* v *Vilas*, 161 U.S. 483. In these cases this Court held that the President of the United States, the Governors of any State or Territory, and cabinet officers of the United States had an absolute immunity in issuing libelous statements which related to their official duties.

Some of the Judges of the Court of Appeals have questioned whether the Courts have gone too far in establishing this rule of absolute immunity. In the case of *Glass* v *Ickes*, 117 F.2d 273, where the Secretary of Interior issued a libelous statement, Judge Groner, while affirming the dismissal of the action on the grounds of immunity, among other things, said:

> "The necessity of the rule is obvious, but its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being. * * * I have felt some doubt about the correctness of the majority opinion. * * * It is quite true that both in this court and the Supreme Court the scope of official authority has been so broadly stated (Cooper v O'Connor) that I am unable to say that the Secretary's press release was not, in view of the general authority of the Secretary concerning the oil industry, a matter 'in relation to matters committed by law to his control' or at least 'having more or less connection with the general matters committed by law to his control', and, in this view I am compelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law. 'The ocean has its appointed bounds, and were it to break throught those limits, its plenitude would become a cataclysm which would engulf a continent.'"

While the Court of Appeals for the District of Columbia sustained the plea of absolute immunity in the case of *Glass* v *Ickes*, supra, a short time later the Court held in the case of *Colpoys* v *Gates*, 118 F.2d 16 that a United States Marshal was not accorded absolute immunity in reporting on one of his deputies.

The petitioner in this case was an administrative officer without policy determining functions. He had no political functions, and he was subject to the orders and the policy making decisions of the Secretary of the Navy, and the Secretary of Defense. To extend absolute immunity to the petitioner would mean that hundreds of military and naval officers in charge of small or large establishments would also be entitled to absolute immunity and open the door so that hundreds and even thousands of loyal Americans could be libeled without any recourse against these inferior officers.

The petitioner relies upon cases which involve Cabinet officers, and while Respondents believe that the Courts have gone too far in throwing a cloak of immunity around Cabinet officers and particularly where the libelous statements were clearly false and malicious, the Respondents do not dispute the rule that if the petitioner had been a Cabinet officer he would be entitled to absolute immunity under the decisions of this Court. This, even though Respondents doubt their soundness, and with the hope that some day this Court will modify the decisions where acts of Cabinet officers are clearly malicious. The public is entitled to protection as well as high ranking officials.

It has been held certain inferior officers of the government such as this petitioner are not entitled to absolute immunity.

City of Mullen for the use of Jones v Davidson et al
West Va. 57 S.E. 2nd 1, 13 A.L.R. 2nd 887
See collected cases 13 A.L.R. 2nd pages 897-903
33 Am. Jur. Par. 143, Page 140

The brief of the petitioner rests their case primarily on the right of the petitioner to release the communication to the Members of Congress from Massachusetts. No showing is made that any member of Congress to whom the copy was sent requested such a communication. No showing is made that at the time that the release to the Congressmen that there was pending before Congress any matters under investigation in the Boston Naval Shipyard, nor was the communication in reply to any letter or inquiry by the Congressmen. It was purely and simply a gratuitous act on the part of the petitioner in an attempt to discredit the Respondents, and the Federal Employees Veterans Association.

The Respondents rely not only on the release to the Members of Congress from Massachusetts, but also on the release of the libelous communication to the editors of the daily newspapers in the City of Boston. The Court's attention is directed to the affidavit of J. A. Snackenberg (R.21, par. 6). Please note that this affidavit states that the release to the editors of the various newspapers in Boston, Massachusetts was an authorized routine. Therefore the petitioner knew that upon furnishing a copy of the communication in question it would be released to the press of the City of Boston. The petitioner set in motion the release to the editors of the newspapers in Boston, Massachusetts. There is a general agreement among the authorities upon the broad proposition that one who publishes a dafamatory statement is liable for injurious consequences of the repetition thereof by third parties where such repetition is the natural and probable result of the original publication.

33 Am. Juris. Section 197, page 185

The following case illustrates the modern rule in libel cases.

In the case of Matteo v Barr the defendant was the Acting Director of the Office of Rent Stabilization. The

plaintiff Matteo was an employee. A terminal leave bill which the plaintiff had sponsored was before Congress. The defendant had opposed the plan. Without his knowledge, the defendant's secretary signed a letter approving the plan. When this fact was ascertained by the defendant he issued a press release, and he was then sued for libel. He defended upon the ground that his release to the press was absolutely privileged. The plaintiff recovered a judgment against the defendant, and an appeal was taken. The judgment was affirmed by the Court of Appeals (244 F.2d 767), and upon petition for certiorari, which was granted, this Court on December 9, 1957 reversed the judgment of the Court of Appeals (355 U.S. 171) but only on the ground that the Court of Appeals refused to consider the question of whether the press release was qualifiedly privileged. Since the remand from this Court, the Court of Appeals has again considered this case and held that the defendant had a qualified privilege in releasing the story to the press. This decision was rendered on June 12, 1958, and the case was remanded to the District Court as to whether the defendant lost the privilege by reason of malice or lack of reasonable grounds to believe that the contents of his publication were true.

The case of *Pearson* v *Wright* (U. S. Dist. Court D.C.) decided on November 8, 1957, 156 Fed. Supp. 136 by the distinguished jurist Holtzoff is particularly applicable to the situation in this case insofar as it relates to the release of the communication to the editors of the newspapers in Boston. In that case the defendant was the Chairman of a Commission on Governmental Security. The Chairman of Government Information Subcommittee of the House of Representatives sent a communication to the defendant in his official capacity in which certain information was request which related to matters within the scope of the commission. The defendant replied to the chairman of the Congressional Committee giving the information requested. The alleged defamatory statements were contained in this letter.

The Court held that the head of a government agency or bureau has a duty to respond to information requested by the Chairman of a Congressional Committee, and that absolute privilege attaches to the communication. The second count of the complaint was based upon the defendant's statement to the press. The Court held that statements to the press made by a governmental official are not absolutely privileged and that such an official may be held liable for such a statement if it contains defamatory statements. The petitioner in this case, having set in motion a release to the press in Boston, Massachusetts, is liable for releasing the communication to the press. He is also liable for his release to the Members of Congress from the State of Massachusetts.

There is also a rule of law which requires a person who releases defamatory statements to make a fair and reasonable report.

Robinson v Johnson, 239 Fed. 671, 152 CCA 505, 8th CCA

The protection afforded the maker of an allegedly libelous statement who seeks a claim of qualified privilege is lost in the presence of malice on the part of the maker.

Maurice v Worden, 54 Md. 233 (Supt. of Naval Academy)
Gray v Mossman, 88 Conn. 247, 90 A. 938
Peterson v Steenerson, 113 Minn. 87

One who issues a libelous statement in bad faith and with malice presents a question of fact for the jury under the laws of Massachusetts.

Wright v Lathrop, 149 Mass. 385, 21 N.E. 963 (1889)
Hupfer v Rosenfield, 162 Mass. 131, 38 N.E. 197 (1894)
Doane v Grew, 220 Mass. 171, 107 N.E. 620 (1915)
See Also:
Stevenson v Morris, 288 Pa. 405, 136 A. 234

Cf. Bereman v Power Publ. Co., 93 Colo. 581, 27 P (2d) 749

Kroger Grocery & Baking Co. v Yount, 66 F.2d, 700 (CCA 8th)

In Robinson v Johnson, supra the defendants published extracts from a report signed by the Assistant Secretary of Interior, and asserted that he was absolutely privileged to do so. The Court of Appeals for the 8th Circuit held that the publication was neither fair nor reasonable.

The communication which the petitioner prepared for his superiors in the Navy Department in Washington was neither a fair nor a reasonable report, and the comment and charges filed against the Respondents were clearly defamatory and libelous per se.

The Report Of The Petitioner Was Neither Fair Nor Reasonable; And Was Clearly Malicious Being Libelous Per Se.

Let us now examine the contents of the libelous publication which the petitioner released to the Members of Congress from Massachusetts, and to the Editors of the newspapers in the City of Boston, Massachusetts.

The libelous publication is set forth on pages 8-15 of the Record. It is marked exhibit "A", and was attached to the complaint filed by the Respondents. The Court's attention is directed to the entire exhibit but it is deemed proper to invite the Court's attention to certain paragraphs in the communication which are believed to be libelous per se. On page 11 of the record, it is stated in this communication in part:

> "Federal Employees Veterans Association Post No. 1, has a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans

> Association, who, coincidentally are shipyard employees, and at least one of whom is a supervisor, and therefore a member of shipyard management."

On Page 12—

> "They wonder why a management which must be considered sound since the Navy Department condones its existence continues to permit a condition which amounts to OVERT SUBVERSION to exist, operate and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely."

In justification for the defamatory communication of the petitioner there was attached to the petitioner's brief in the Court of Appeals below an appendix showing a release made by the Federal Employees Veterans Association. This release is set forth on pages 26 to 35 of the Record.

Let us now examine this release of the Federal Employees Veterans Association to see if there is any justification for the charge that the Respondents actions amounted to "obert subversion" as referred to in the libelous communication issued by the petitioner.

On pages 26 and 27 reference is made to the National Convention of the Federal Employees Veterans Association, and the dinner. Anything subversive about having a National Convention and a dinner? On page 27 reference is made to the rope walk which as a matter of fact had been in existence practically since the Navy Yard at Boston was in operation. The statement related to an alleged attempt to close this shop. Anything subversive in trying to retain in the Shipyard employees who were in the rope walk? On pages 27 and 28 complaint is made about the refusal of annual leave after employees had planned and paid for cottage rent during the usual sum-

mer vacation period. Anything subversive about complaining about vacation periods? On page 28 complaint is made about the failure to close the shipyard when the summer heat reached the 100 mark, and a higher temperature where the employees were working, and attention was called to the fact that the governmental employees at Watertown Arsenal, and other places, had been released. Is there anything subversive about such a complaint?

On page 29 reference is made to the restoration of some 100 employees at the Hingham Naval Ammunition Depot who were restored by Court order. Is there anything subversive in reporting that the organization which Respondents represent had been successful in a lawsuit, or was it subversive to use the Courts to enforce the rights of employees? The very purpose of the organization is to protect the rights of the employees under the Civil Service laws of the United States and the Veterans Preference Acts.

On page 30 a statement is made about a wage survey with the information that a wage raise had been given to employees at the Bethlehem Steel plant. The blue collar workers who belonged to the organization represented by the Respondents were entitled to a wage in conformity with what was being paid like workers in private industry. Is it subversive to ask for a wage raise in accordance with the law under which the blue collar workers were entitled to a raise?

On page 31 a statement is made about promotional policies where employees with higher ratings and better qualified were not promoted apparently because they were Jews. IS it anything subversive to protest that the employee who had a higher rating was not promoted?

It is not necessary to recite all contained in the memorandum referred to in petitioner's brief before the Court of Appeals. The rest of the exhibit which was attached to

show that the Respondents were "subversive" relates to a physician who told a veteran of the Korean War who reported for treatment that he ought to go back to the jungle. A report about the hurricane and the cafeteria, all of the matters discussed in the memorandum which the petitioner claimed were "subversive" relate to matters ordinarily discussed by labor and management representatives.

The words "overt subversive" are actionable per se.

State ex rel Kelly v Whienant, (Fla.) 80 So. 2nd 611, 612
Thompson v Wallin, 95 N.Y.S. 2nd 784, 789, 276 App.Div. 463

Malice is presumed where the words are actionable per se.

26 Words & Phrases Judicially defined page 230, under Libel & Slander.
Doane v Grew, 107 N.E. 620, 622, 220 Mass. 171
State Ex rel Kelly v Whienant, supra.

Based upon the appendix to the petitioner's brief in the Court of Appeals setting forth the reasons for the libelous communication it is believed that no fair minded person could seriously contend that the matters of which the petitioner complained about the Federal Employees Veterans Association, as shown by the exhibit attached to the brief (R. 26-35), were in fact justified, but that the petitioner not only departed from the truth in describing the activities of the Respondents but that his actions were motivated by malice and a lack of reasonable grounds to believe that the contents of his publication were true statements of fact. The charge that the activities of the Respondents amounts to overt subversion is about as despicable a statement as could be made of two loyal American citizens, both of whom had served their country in time of war and received honorable discharges, and the Respondent Lyons was not only in World War II but also

in the Korean War. Their loyalty to the United States cannot even be doubted.

Is this Court going to grant to the petitioner the right with complete immunity in the future to libel others who are loyal citizens of the United States? If this case is reversed, a license to that effect will be issued.

On pages 28 and 30 of the petitioner's brief Counsel for the petitioner almost tearfully pleads that no inferior officers of the government should be subject to libel suits. They should not even be "qualifiedly privileged". They must have complete immunity. There is one sure way that they can have complete immunity from suits for libelous statements, and that is to abstain from making libelous statements about their employees or other persons. The public is entitled to protection against officials who issue malicious libels. Is it too much to expect from public servants that their conduct be such that they will not maliciously libel the public for whom they serve or the persons over which they have supervision?

CONCLUSION

In the interest of right and justice the judgment of the United States Court of Appeals for the First Circuit should be in all things affirmed.

Respectfully submitted,

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